TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1925

No. [redacted] 104

IRENE HAND CORRIGAN AND HELEN CURTIS, OTHERWISE KNOWN AS MRS. A. L. CURTIS, APPELLANTS,

vs.

JOHN J. BUCKLEY

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

FILED JUNE 21, 1924

(30,424)

(30,484)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 469

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APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 30, 1924

[fol. 1] **COURT OF APPEALS OF THE DISTRICT OF COLUMBIA**

[Caption omitted]

SUPREME COURT OF THE DISTRICT OF COLUMBIA

Equity. No. 40702

JOHN J. BUCKLEY, Plaintiff,

vs.

IRENE HAND CORRIGAN and HELEN CURTIS, Otherwise Known as Mrs. A. L. Curtis, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Coluumbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to-wit:

ORIGINAL BILL OF COMPLAINT—Filed November 16, 1922

[Title omitted]

The bill of complaint of the above named plaintiff respectfully shows to the Court as follows:

1. The plaintiff John J. Buckley is a citizen of the United States of lawful age and a resident of the District of Columbia, and brings [fol 2] this suit in his own right, and also on behalf of such other persons similarly situated as may subsequently, with leave of this Court, intervene herein and become parties hereto.

2. Plaintiff is informed and believes and therefore avers that the defendants Irene Hand Corrigan and Helen Curtis are, respectively, citizens of the United States of lawful age and residents of the District of Columbia; and the said defendants Corrigan and Curtis are sued, respectively, in their own right.

3. That the plaintiff now is and for some time last past continuously has been the owner of an undivided interest in that certain piece or parcel of land lying and being in the City of Washington, District of Columbia, known and described as Lot 74, Square 152, as recorded in the Surveyor's office of said District and improved by dwelling house and premises known as 1719 S Street, Northwest, Washington, District of Columbia; that is to say, the plaintiff and his sister, May V. Buckley, are the owners in equal shares of the said

land described in this paragraph subject to a life estate in the same of Margaret E. Buckley, mother of plaintiff and said May V. Buckley.

4. That the defendant Irene Hand Corrigan now is, and for some time last past continuously has been, the owner of that certain piece and parcel of land lying and being in the City of Washington, District of Columbia, known and described as Lot 20, Square 152, as recorded in the Surveyor's office of said District and improved by dwelling house and premises known as 1727 S Street, Northwest, in said City and District.

5. That on, to-wit, the 1st day of June, A. D., 1921, the plaintiff, as one of the owners of the land and premises hereinbefore described in paragraph 3 hereof, and the defendant Corrigan as the owner of the land and premises hereinbefore described in paragraph 4 hereof, together with the said May V. Buckley and Margaret E. Buckley, mentioned in paragraph 3 hereof and a large number, to-wit, twenty-eight, other persons, all of whom, at said last mentioned date, severally owned certain other, to-wit, twenty-three other parcels of lands and premises improved by dwelling houses adjacent and contiguous to and in the same immediate neighborhood of the said land and premises hereinbefore described in paragraphs 3 and 4 of this bill, all improved by dwelling houses and all lying and being in the City of Washington, District of Columbia, more particularly in Squares numbered 152 and 153, respectively, as recorded in the Surveyor's Office of said District and severally situated on both the north and south sides of "S" Street, between New Hampshire Avenue and 18th Street, Northwest, in said City and District, made and entered into an Indenture or Covenant and duly executed, acknowledged and mutually delivered the same as provided by law and caused the same to be deposited for record in the office of the Recorder of Deeds for the District of Columbia on the 20th day of August, A. D., 1921, where the same was duly recorded on said 20th day of August, A. D., 1921, in Liber No. 4,532, at Folio 277, et seq., of the land records of the said District. All the persons who executed said Indenture or Covenant as aforesaid are white persons, a large number of whom [fol. 3] occupied, resided in and made their homes, and continued to occupy, reside and make their homes in said premises, respectively.

6. After reciting in said Indenture or Covenant that they were the several owners of the lands and premises described therein, and mentioned and described in paragraphs 3, 4, and 5 of this bill, and that they desired, for their mutual benefit, as well as for the best interests of the community and neighborhood comprising said lands, dwelling houses and premises, to improve and in any legitimate way to further the interests of the same, the said plaintiff and the said defendant Corrigan and the said other parties to said Indenture or Covenant did therein and thereby, in consideration of the premises and the sum of Five Dollars ($5.00) each to the other in hand paid, mutually covenant, promise and agree, each with the other and for their respective heirs and assigns, that no part of the land then severally owned by the parties to said Indenture or Covenant and de-

scribed therein, including the respective lands and premises of the plaintiff and defendant Corrigan as hereinabove in paragraphs 3 and 4, respectively, described, shall ever be used or occupied by, or sold, conveyed, leased or rented to negroes or any person or persons of the negro race or blood, and that the said Indenture or Covenant shall run with the land and bind the respective heirs and assigns of the parties thereto, including the plaintiff and the defendant Corrigan as aforesaid, for a period of twenty-one years from and after the date thereof. Plaintiff attaches hereo marked Exhibit No. 1 a true copy of said Indenture or Covenant, and prays that the same be read as a part of this bill as fully as if set out herein.

7. That on or about the 26th day of September, 1922, the defendant Corrigan being the owner of lands and premises hereinabove in paragraph 4 described; which said lands and premises are restricted as to ownership, use or occupancy by the said Indenture or Covenant as aforesaid, executed and entered into a so-called Sales Contract with the defendant Curtis, by the terms of which the defendant Curtis, under the name Mrs. A. L. Curtis, did therein and thereby agree to purchase from the defendant Corrigan and the defendant Corrigan did therein and thereby agree to sell to the defendant Curtis the said lands and premises mentioned and described in paragraph 4, hereof, under the terms and provisions as in said Sales Contract set forth. Thereafter, on or about the 10th day of October, 1922, the defendant Curtis delivered for record the said Sales Contract at the office of the Recorder of Deeds of the District of Columbia, there appearing on the back of the paper writing containing said sales contract a purported acknowledgment and certificate by a notary public. Plaintiff attaches hereto marked Exhibit No. 2 a true copy of said Sales Contract and purported acknowledgment and certificate, and prays that the same be read as a part of this bill as fully as if set out herein.

8. That the defendant Curtis with whom the defendant Corrigan entered into the contract of sale mentioned and described in paragraph 7 hereof, is a negress and a person of the negro race and blood [fol. 4] and is the wife of one Arthur L. Curtis who is also a person of the negro race and blood, and at and before the making of said contract of sale had knowledge of the existence, contents and terms of said Indenture or Covenant mentioned and described in paragraph 6 hereof; and that in executing and entering into said contract of sale the defendant Corrigan promised and agreed to do and perform certain acts and things in violation of the terms and conditions of the Indenture or Covenant hereinabove in paragraph 6 described, to-wit, the said defendant Corrigan promised and agreed in said contract to sell and convey the said land and premises mentioned and described in paragraph 4 hereof to a negress and a person of negro race and blood, in violation of said Indenture or Covenant.

9. Plaintiff is informed and believes and upon such information and belief avers, that upon being advised and informed that de-

fendant Corrigan had executed and entered into the aforesaid contract of sale a number of the persons who are parties to the aforesaid Indenture or Covenant both verbally and in writing objected and protested to the defendant Corrigan against the execution or carrying out by her of the terms and provisions of said contract of sale, and that in response to said objections and protests and in justification of her attempted breach and violation of said Indenture or Covenant as aforesaid, the said defendant Corrigan stated both verbally and in writing to several of said parties that she was tricked and defrauded into signing the aforesaid contract of sale by reason of misstatements and misrepresentations made to her by the real estate broker negotiating the said contract and by the defendant Curtis to the effect that said defendant Curtis was not a negress or a person of negro race or blood, but on the contrary was a white person; and plaintiff is informed and believes and therefore avers that the defendant Corrigan, through her attorney, thereupon communicated with the defendant Curtis demanding a cancellation of the said contract of sale on the ground of fraud and misrepresentation aforesaid used and resorted to in procuring the defendant Corrigan to enter into the said sales contract.

10. The plaintiff is credibly informed and believes and therefore avers that subsequently the defendant Curtis tendered to the defendant Corrigan the money and notes representing the purchase price provided in the said contract of sale for the land and premises involved as aforesaid, and demanded a conveyance of the same and that defendant Corrigan thereupon, on the ground of said misrepresentations, did decline and refuse to accept the said money or notes or to sign or deliver a deed to defendant Curtis to said land and premises or in any manner to execute or carry out the terms and provisions of the aforesaid contract of sale.

11. That plaintiff is credibly informed and believes and therefore avers that subsequently, on, to-wit, October 21, 1922, the defendant Corrigan reversed her position as aforesaid in respect to the said contract of sale, and in a letter to her attorney, bearing the date last aforesaid, stated, among other things, in effect that her personal interests made it imperative that she dispose of said land and premises at once, that she had hoped that the defendant Curtis would [fol. 5] consent to cancel the said contract of sale, but that she believed at the time of writing said letter, to-wit, October 21, 1922, that said hope was unfounded, that defendant Curtis intended to attempt to enforce the said contract, and that she, defendant Corrigan, was unwilling to suffer the expense, embarrassment and loss of income in preventing its enforcement.

12. Plaintiff is credibly informed and believes and therefore avers that subsequently on, to-wit, November 8, 1922, the defendant Corrigan definitely stated in a letter bearing the date last aforesaid that she would not "fight" the said contract of sale, that is to say, would not refuse to execute and carry out the terms and conditions thereof, nor would she refuse to sell and convey to defendant Curtis the land

and premises involved as aforesaid, nor would she refuse to make, sign, seal and deliver a deed to the same to said defendant last named, but on the contrary in the letter last mentioned proposed that the persons who are parties to the aforesaid Indenture or Covenant, or some of them, purchase and take over her said land and premises on the same terms as provided in the said contract of sale and oppose the defendant Curtis in the courts and otherwise in obtaining and maintaining possession of the same against the defendant Curtis, and also guarantee and indemnify the defendant Corrigan from and against any and all loss or damage by reason of a breach of the said contract of sale, that is to say, by reason of the refusal of said defendant Corrigan to carry out the terms thereof.

13. That such proposal last named has not been and will not be accepted by plaintiff nor, so far as plaintiff is aware and believes, by any of the other parties to said Indenture or Covenant, and plaintiff is credibly informed and believes and therefore avers that the defendant Corrigan, for several days last past has been, and now is, threatening to execute and carry out and is about to execute and carry out the terms and provisions of the aforesaid contract of sale and in pursuance thereof to sell and convey to defendant Curtis the land and premises involved as aforesaid and to make, sign, seal and deliver a deed to the same to said defendant Curtis.

14. That if the threats aforesaid are fulfilled and carried out and the defendant sells and conveys to defendant Curtis the said land and premises and makes, signs, seals and delivers a deed to the same to said defendant Curtis, irreparable injury will be done to the plaintiff and to the other persons who are parties to the aforesaid Indenture or Covenant and that plaintiff has no plain, adequate and complete remedy at law; and plaintiff further avers that he is entitled to specific performance on the part of the defendant Corrigan of her said agreements and covenants as set out in the said Indenture or Covenant mentioned and described in paragraph 6 of this bill and to have the terms and provisions of said Indenture or Covenant specifically enforced in equity by means of an injunction preventing both the said defendants Corrigan and Curtis from carrying into effect the said contract of sale mentioned and described in paragraph 7 of this bill.

Wherefore the premises considered the plaintiff prays:

1. That process may issue against the defendants named herein [fol. 6] commanding them and each of them to appear herein on a day certain to answer the exigencies of this bill of complaint as fully as if specially interrogated thereto.

2. That defendant Irene Hand Corrigan be permanently enjoined during the period of twenty-one years from the date of said Indenture or Covenant, to-wit, the 1st day of June, A. D., 1921, from complying with or carrying out in any manner whatsoever all or any of the terms and provisions of the contract of sale hereinabove men-

tioned, and from directly or indirectly selling and conveying, or causing to be sold and conveyed, to the defendant Helen Curtis, otherwise known as Mrs. A. L. Curtis, the said land and premises mentioned and described in paragraph 4 of this bill, and from making, signing, sealing and delivering to the said defendant Curtis a deed or any other form of conveyance of said land and premises.

3. That the said defendant Helen Curtis, otherwise known as Mrs. A. L. Curtis, and her heirs and assigns, be permanently enjoined, during the period of twenty-one years from the date of said Indenture or Covenant, to-wit, the first day of June, A. D., 1921, from taking title, directly or indirectly, to said land and premises mentioned and described in paragraph 4 of this bill, and from using or occupying the same and from selling, conveying, leasing, renting or giving the same to or permitting the same to be used or occupied by any negro or negroes or person or persons of negro race or blood.

4. For such other and further relief as to the Court may seem just and proper.

John J. Buckley. James S. Easby-Smith, Leslie C. Garnett, David A. Pine, Attorneys for Plaintiff.

DISTRICT OF COLUMBIA, ss:

John J. Buckley, being first duly sworn, deposes and says that he has read the foregoing bill of complaint by him subscribed and knows the contents thereof, and that he verily believes the facts stated therein to be true.

John J. Buckley.

Subscribed and sworn to before me this 16th day of November, 1922. F. Morgan Cook, Notary Public, D. C. (Seal.)

[fol. 7] [Title omitted]

EXHIBIT NO. 1 TO BILL OF COMPLAINT

This indenture made this first day of June A. D. 1921, by and between the undersigned, all being residents of the City of Washington, District of Columbia, and owners of real estate situate therein, witnesseth that:

Whereas the said parties hereto are all owners of real estate situate in the District of Columbia, and located on S Street, between New Hampshire Avenue and 18th Street, Northwest, both on the north side and south side of said street, said property being parts of Squares 152 and 153 as recorded in the Surveyor's Office of the District of Columbia, and

Whereas the said parties hereto desire, for their mutual benefit, as well as for the best interests of the said community and neighbor-

hood, to improve — in any legitimate way further the interests of said community,

Now therefore, in consideration of the premises and the sum of Five Dollars ($5.00) each to the other in hand paid, the parties hereto do hereby mutually covenant, promise and agree each with the other and for their respective heirs and assigns, that no part of the land now owned by the parties hereto, a more detailed description of said property being given after the respective signatures hereto, shall ever be used or occupied by, or sold, conveyed, leased, rented, or given, to Negroes or any person or persons of the Negro race or blood. This covenant shall run with the land and bind the respective heirs and assigns of the parties hereto for the period of twenty-one (21) years from and after the date of these presents.

Name		Description of land
Jno. Lewis Smith.	(Seal.)	1730 S St. Lot 57 Square 153, and lot 56 in Square 153, & Square 153.
Claribel C. Smith.	(Seal.)	1730 S St. Lot 57 Square 153.
James B. Archer.	(Seal.)	Lot 56 Square 153.
Irene Hand Corrigan.	(Seal.)	1727 S Lot 70 Square 152.
W. M. Wallace.	(Seal.)	1728 S St. Lot 58 Sq. 153.
[fol. 8]		
James S. Easby-Smith.	(Seal.)	1721 S St. N. W. Lot 73 Sq. 152.
Julia C. Douglas.	(Seal.)	1723 S St. N. W. Lot 72 Sq. 152.
Allan E. Walker.	(Seal.)	1725 S Street N. W. Lot 71 Square 152.
Maude K. Walker.	(Seal.)	Lot 71 Square 152.
Douglass E. Bullock.	(Seal.)	Lot 114 Square 153 1746 S Street, N. W.
Mary T. Thornton.	(Seal.)	1748 S, Square 153 Lot 113.
Mrs. A. K. Gibson.	(Seal.)	Lot 59 Square 153 1726 S St.
M. D. Moore.	(Seal.)	1722 S Street N. W. Lot 807 Sq. 153.
Mrs. E. Bool.	(Seal.)	Lot 800 Squar- 152 1707 S St. N. W.
Florence Gibbs Johnson.	(Seal.)	Lot 800 Square 152 1707 "S" Street, N. W.
Ida B. Higley.	(Seal.)	1742 S Street N. W. Lot 116 Square 152.
Henry P. West.	(Seal.)	1744 S St. Lot #115 Sq. 153.
Sue Eaton West.	(Seal.)	1744 S St. Lot #115 Sq. 153.

Name		Description of land
Stephen E. Cochran.	(Seal.)	Lot 77 Square 152 1711 S St. N. W.
Katie F. Lannen.	(Seal.)	Lot 117 Square 153 1740 S St. N. W.
Louis J. Fosse.	(Seal.)	Lot 76 Square 152 1713 S St. N. W.
Michael M. Lyons.	(Seal.)	Lot 75 Square 152 1717 S St. N. W.
John J. Buckley.	(Seal.)	Lot 74 Square 152 1719 S St. N. W.
(Mrs.) Margaret E. Buckley.	(Seal.)	Lot 74 Square 152.
Mary J. Wallis.	(Seal.)	Lot 111, Square 153 1752 S St.
James A. Tumelty.	(Seal.)	Lot 27 Square 152 1729 S N. W.
May V. Buckley.	(Seal.)	Lot 74 Square 152 1719 S N. W.
J. Maury Dove.	(Seal.)	Lot 808 Square 153.
Mrs. Mary M. Dunbar	(Seal.)	1737 S St. N. W. Lot 26 Square 152.
C. N. Allison.	(Seal.)	1731 S St. N. W. Lot 178 Square 152.
[fol. 9]		
Frederick D. Owen.	(Seal.)	1750 S St. N. W. Lot 112, Sq. 153.
Mary V. Merrick.	(Seal.)	1754 S St. E. 18 ft. of Lot 48 and 22.50 ft. of Lot 49 on S Street.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, W. Edgar Leedy, a Notary Public in and for the District of Columbia, do hereby certify that John Lewis Smith, Claribel C. Smith, James B. Archer, Irene Hand Corrigan, W. M. Wallace, James S. Easby-Smith, Julia C. Douglas, Allan E. Walker, Maud K. Walker, Douglas E. Bullock, Mary T. Thornton, Mrs. A. K. Gibson, M. D. Moore, Mrs. E. Bool, Florence Gibbs Johnson, Ida B. Higley, Henry P. West, Sue Eaton West, Stephen E. Cochran, Katie F. Lannen, Louis J. Fosse, Michael W. Lyons, John J. Buckley, Margaret E. Buckley, Mary J. Wallis, James A. Tumulty, May V. Buckley, J. Maury Dove, Mrs. May M. Dunbar, C. N. Allison, and Frederick D. Owen, parties to a certain indenture bearing date on the first day of June, 1921, and hereto annexed, personally appeared before me in said District the said John Lewis Smith, Claribel C. Smith, James B. Archer, Irene Hand Corrigan, W. M. Wallace, James S. Easby-Smith, Julia C. Douglas, Allan E. Walker, Maud K. Walker, Douglas E. Bullock, Mary T. Thornton, Mrs. A. K. Gibson, M. D. Moore, Mrs. E. Bool, Florence Gibbs Johnson,

Ida B. Higley, Henry P. West, Sue Eaton West, Stephen E. Cochran, Katie F. Lannen, Louis J. Fosse, Michael W. Lyons, John J. Buckley, Margaret E. Buckley, Mary J. Wallis, James A. Tumulty, May V. Buckley, J. Maury Dove, Mrs. May M. Dunbar, C. N. Allison, and Frederick D. Owen, being personally well known to me as the persons who executed the said Indenture, and acknowledged the same to be their act and deed.

Given under my hand and seal this 21st day of June, 1921.
W. Edgar Leedy, Notary Public, D. C. (Notarial Seal.)

UNITED STATES OF AMERICA,
State of Maryland,
County of Howard, set:

I, Mary E. T. Sanner, a Notary Public, in and for the State of Maryland, County of Howard, do hereby certify that Mary V. Merrick, a party to a certain indenture bearing date on the first day of June, 1921, and hereto annexed, personally appeared before me in said County, the said Mary V. Merrick being personally well known to me as the person who executed the said indenture, and acknowledged the same to be her act and deed.

Given under my hand and seal this 28th day of July, 1921.
Mary E. T. Sanner, Notary Public. (Notarial Seal.)

[fol. 10] [Title omitted]

EXHIBIT NO. 2 TO BILL OF COMPLAINT

Washington, D. C., September 25, 1922.

Received from Mrs. A. L. Curtis a deposit of the sum of five hundred Dollars to be applied as part payment of purchase price of lot — in square —, with improvements thereon known as 1727 S St. N. W., in the District of Columbia, as follows:

Price of property sixteen thousand five hundred dollars.

Terms of sale five thousand dollars in cash, balance payable in annual installments of $1,000 with privilege of paying additional installments in amounts of $1,000 or multiple thereof at any interest period with interest on said balance at seven per cent payable semi-annual-.

Secured by deed of trust constituting a first lien on the property hereby sold, in form customarily used in the District of Columbia.

Where trustees are to be named in a deed of trust or trusts, the said trustees are to be named by the party respectively secured thereby.

The title is to be good of record except as to covenants of record, if any, or deposit is to be returned and sale declared off at option of the

purchaser; but the seller and agent are hereby expressly released from all liability for damages by reason of any defect in title. In case legal steps are necessary to prove title such action must be taken by the seller promptly at his own expense, whereupon the time herein specified for full settlement by purchaser will thereby be extended the period necessary for such prompt action.

Rents, taxes, water rent, insurance and interest on existing incumbrances, if any, are to be adjusted to date of transfer. Taxes are to be adjusted according to certificate of taxes as issued by the Collector of Taxes of the District of Columbia; except that special improvements completed prior to date hereof, whether assessment therefor has been levied or not, shall be paid or proper allowance made therefor by the vendor at the time of the transfer.

Examination of title, conveyancing, notary fees, and all recording charges including those for purchase money trust, if any, are to be at the cost of the purchaser. Revenue stamps on deed to be paid by vendor, who shall execute to the purchaser the usual special warranty deed.

[fol. 11] The purchaser agrees to comply with the terms herein of sale within 30 days from the date of acceptance by owner or the deposit will be forfeited, in which event one-half of said deposit shall be paid to E. E. Geiger, but the forfeiture of deposit shall not relieve the purchaser from responsibility of complying with terms of sale.

This contract is made in Triplicate subject to the approval of owner and contains the entire agreement between the parties thereto.

Vendor agrees to repair and paper ceiling in dining room.

E. E. Geiger, Agent.

We, the undersigned, hereby ratify, accept and agree to the above memorandum of sale, and acknowledge it to be our contract.

Mrs. A. L. Curtis, Purchaser. Irene Hand Corrigan, Owner.

Date, September 26th, 1922.

NOTE.—Following on back of contract:

DISTRICT OF COLUMBIA, ss:

I, Theodore L. Baker, a notary public in and for the District of Columbia, certify that before me personally appeared one Mrs. A. L. Curtis, the said Mrs. A. L. Curtis being personally well known to me and made oath in due form of law that the contract of sale hereto attached is her own act and deed.

Mrs. A. L. Curtis, Affiant.

Subscribed and sworn to before me this 10th day of October, 1922. Theodore L. Baker, Notary Public.

Received for record on the 10th day of October, A. D. 1922, at 2-16 P. M. and recorded in Liber No. — et seq. of the land records of the D. C.

—— ——, Recorder.

SUPREME COURT OF THE DISTRICT OF COLUMBIA

MOTION OF DEFENDANT NO. 2 TO DISMISS BILL—Filed December 7, 1922

* * * * * * *

Comes now the defendant, Helen Curtis, in the above entitled cause, by her attorneys, and moves the Court to dismiss the Bill of Complaint therein, upon the following grounds:

As in and by the said Bill, as it sets forth and appears, the alleged Indenture or Covenent is void, in that, it attempts to deprive the de- [fol. 12] fendant, the said Helen Curtis, and others of property, without due process of law; abridges the privileges and immunities of citizens of the United States, including the defendant, Helen Curtis, and other persons within this jurisdiction the equal protection of the law, and therefore, is forbidden by the Constitution of the United States, and especially by the Fifth, Thirteenth, and Fourteenth Amendments thereof, and the Laws enacted in aid and under the sanction of the said Thirteenth and Fourteenth Amendments.

Emory B. Smith, James A. Cobb, Attorneys for Defendant Helen Curtis.

SUPREME COURT OF THE DISTRICT OF COLUMBIA

OPINION—Filed April 12, 1923

* * * * * * *

This is a motion by the defendant Helen Curtis to dismiss as not stating a cause of action for an injunction a bill which makes the following case.

The plaintiff and other owners of real property in a certain block in the District of Columbia one of whom was the defendant Irene H. Corrigan owning separately twenty-four parcels of real estate in that block improved by dwelling houses made an agreement on June 1, 1921, which was recorded in the office of the Recorder of Deeds for the District. All the parties to the agreement were white persons a large number of whom resided and continue to reside on the premises respectively. The agreement recites that the parties for the mutual benefit of the community and neighborhood comprising the said property desired to improve and in any legal way further the interest of the same and provides that in consideration of the premises and of the sum of five dollars each to the other paid the parties thereto "mutually covenant, promise and agree each with the other and for their respective heirs and assigns, that no part of the land now owned by the parties hereto, a more detailed description of said property being given after the respective signatures hereto, shall ever be used or occupied by, or sold, conveyed, leased, rented, or given, to

Negroes or any person or persons of the Negro race or blood. This covenant shall run with the land and bind the respective heirs and assigns of the parties hereto for the period of twenty-one (21) years from and after the date of these presents."

On September 26, 1922, the defendant Corrigan entered into a contract with the defendant Curtis by which the latter agreed to purchase and the former agreed to sell her parcel of land included in the restrictive agreement which contract of sale was recorded on October 10, 1922, in the office of the Recorder of Deeds for the District. The contract of sale provided that the title to the property was to be good of record "except as to the covenants of record if any." [fol. 13] The defendant Curtis is a negress and a person of the negro race and blood and is the wife of one who is a person of the negro race and blood and at and before the time of said contract of sale had knowledge of the existence and terms of the agreement between the plaintiff and the other property owners.

The bill was filed November 16, 1922.

The grounds as set forth by Mrs. Curtis on which she moves to dismiss the bill are stated in the motion as follows:

"As in and by the said Bill, as it sets forth and appears, the alleged Indenture or Covenant is void, in that, it attempts to deprive the defendant, the said Helen Curtis, and others of property, without due process of law; abridges the privileges and immunities *or* citizens of the United States, including the defendant, Helen Curtis, and other persons within this jurisdiction the equal protection of the law, and therefore, is forbidden by the Constitution of the United States, and especially by the Fifth, Thirteenth and Fourteenth Amendments thereof, and the Laws enacted in aid and under the sanction of the said Thirteenth and Fourteenth Amendments."

The Court of Appeals has held that the Fourteenth Amendment is not in force in the District of Columbia, Siddons vs. Edmonston, 42 App. D. C. 459, and see District of Columbia vs. Brooke, 214 U. S. 138. However the provisions of that Amendment are so far as concerns the question here involved as broad at least as those of the Fifth and Thirteenth Amendments and if the provisions of the Fourteenth Amendment would not if applicable sustain the defendant's contention the other two Amendments need not be considered. See District of Columbia vs. Brooke, supra, at page 149.

The question here involved has never been directly decided by the Supreme Court of the United States although it has been involved and passed upon by several of the State courts and there ruled adversely to the defendant's contention. It was held in Plessy vs. Ferguson, 163 U. S. 537, that mere discrimination between races is not sufficient to invalidate a State statute. That case will be referred to later and more at length. In Title Guarantee and Trust Company vs. Garrott, 42 Calif. App. 152, the Court refused to enforce a condition in a deed providing for forfeiture in case of a sale of the property to any person of African, Chinese or Japanese descent

but stated that it did not place its decision on any supposed constitutional right. The argument that to enforce such a condition would be to deprive the defendant of the equal protection of the law was met by the Court as follows:

"The fourteenth amendment, in so far as it prohibits any abridgement of the privileges or immunities of citizens of the United States and guarantees the equal protection of the laws to all persons, addresses itself to the state government and its instrumentalities, to its legislative, executive, and judicial authorities, and not to contracts between individuals. It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the [fol. 14] subject matter of the amendment. (Civil Rights Cases, 109 U. S. 18, 27 L. Ed. 835, 3 Sup. Ct. Rep. 18, see, also, Rose's U. S. Notes.) The fourteenth amendment, it is true, applies to the judicial as well as the legislative department of the state government. But the judiciary does not violate this provision of the federal constitution merely because it sanctions discriminations that are the outgrowth of contracts made by individuals. A different question would be presented if the court, while sanctioning such a provision against persons of African descent as we find in the deed in question here, were subsequently to hold to be invalid a similar provision directed against Hindus, Cingalese, and Maoris, or any other class of persons except negroes. The equal protection clause of the fourteenth amendment makes but one demand upon the state, and gives to the state but one right. It is that the state shall make, execute, and interpret its laws without discrimination. It must not grant rights to one which, under similar circumstances, it denies to another."

It was held in Los Angeles Investment Co. vs. Gary, 181 Calif. 680, that a condition in a deed providing for forfeiture in the event that the property involved should be occupied by a colored person was good and that no constitutional right of the defendant was violated by enforcing it. The Court approves of the decision in Title Guarantee and Trust Co. vs. Garrott, supra.

Restrictions based on difference of race were held not to infringe rights under the Fourteenth Amendment in Parmlee vs. Morris, 218 Mich. 625, and Queensborough Land Co. vs. Cazeau, 136 La. 724. In Koehler vs. Rowland, 275 Mo. 573, and Keltner vs. Harris, 196 S. W. (Mo.) 1, similar restrictions were upheld but there was no discussion of the Amendment.

Ganolfo vs. Hartman, 49 Fed. Rep. (Cir. Ct. Calif.) 181, is in favor of the defendant's contention the Court saying that the equal protection clause of the Fourteenth Amendment forbid- discrimination by the legislature and that a court could not do what the legislature was forbidden to do by sustaining the validity of such a restriction. The decision in that case however is opposed to the decision of the highest court of California in Los Angeles Investment Co. vs. Gary, supra.

For a general discussion of the question see State vs. Gurry, 121

Md. 534, Peoples Pleasure Park Co., Inc., vs. Rohleder, 109 Va. 439, Hopkins vs. Richmond, 117 Va. 639.

The point decided in Buchanan vs. Worley, 245 U. S. 59, a case much relied upon by the defendant, was that a city ordinance which undertook to restrict the right of a white person to convey property to a colored person was in violation of the Fourteenth Amendment.

The weight of authority is in favor of upholding the restrictive agreement.

Except as the question of public policy is raised by urging objections to the restrictive covenant here involved based on constitutional objections to its validity that question is not raised by the motion to dismiss but the defendant urges very strongly in her brief that such a restriction is against public policy and the point is perhaps one that should be considered. The defendant's brief points out [fol. 15] many bad results that may follow from upholding a restriction based on difference in race. They need not be stated here in detail. It seems that they are all met by what is said in Plessy vs. Ferguson, supra. A lengthy quotation from that case is desirable in order to indicate clearly the attitude of the Supreme Court of the United States with reference to enforced separation of races. The Court says at page 544:

"The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based on color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to — brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."

and after referring to a school law of Massachusetts at page 545:

"Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia, Rev. Stat. D. C. ss. 281, 282, 283, 310, 319, as well as by the legislatures of many of the States, and have been generally if not uniformly, sustained by the courts."

and at page 550:

"So far, then, as conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature.

In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment that the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

"We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argu- [fol. 16] ment necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in that assumption. The argument also assumed that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in People vs. Gallagher, 93 N. Y. 438, 448, 'This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting soci ' advantages with which it is endowed.' Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane."

In Wall vs. Oyster, 36 App. D. C. 50, the statute providing for separate schools for white and colored children in the District of Columbia was upheld.

As pointed out by the plaintiff's counsel the municipal authorities of the District have provided for separate bathing beaches, tennis courts, golf course and play grounds.

In view of the declared policy of the Congress which has plenary legislative authority over the District; of the judicial expressions of

the Supreme Court of the United States; of the decisions of the Court of Appeals of the District and of the action of the municipal authorities which has not been questioned by this suit so far as the Court is aware it was not against policy for the plaintiff and the other property owners to make the agreement in question so far as questions of race are concerned.

The defendant has referred to certain legislation of Congress and claims the protection of it. This legislation was enacted for the purpose of supplementing and making more effective the provisions of the Thirteenth and Fourteenth Amendments. The provisions of these statutes cannot of course afford more protection than the Amendments themselves therefore if the decision to be made in this case namely that the defendant's constitutional rights are not violated is sound it is unnecessary to discuss the effect of those statutes. [fol. 17] The decision of this Court in Pierce vs. Reed, Law No. 61968, is not a precedent controlling in this case.

The motion to dismiss the bill is denied with leave to answer in ten days.

Settle decree on notice.

Walter I. McCoy, Chief Justice.

SUPREME COURT OF THE DISTRICT OF COLUMBIA

ORDER OVERRULING MOTION OF DEFENDANT HELEN CURTIS TO DISMISS BILL—Filed April 16, 1923

* * * * * * *

This cause came on to be heard upon the motion of the defendant Curtis to dismiss the bill of complaint herein, and the same having been argued by counsel and submitted to the court, it is by the Court this 16th day of April, A. D., 1923,

Adjudged, ordered, and decreed: That the said motion be and same hereby is overruled and the said defendant Curtis is hereby given leave to answer said bill within ten days from this date.

Walter I. McCoy, Chief Justice.

SUPREME COURT OF THE DISTRICT OF COLUMBIA

MOTION OF DEFENDANT NO. 1 TO DISMISS BILL—Filed April 25, 1923

* * * * * * *

Comes now the defendant Irene Hand Corrigan by her attorney and moves the court to dismiss the bill of complaint filed herein and for grounds of said motion says:

1. That the alleged indenture or covenant made the basis for said bill of complaint is void in that the same is contrary to and in violation of the Constitution of the United States.

2. That the said alleged indenture or covenant is void in that the same is contrary to public policy.

James P. Schick, Attorney for Defendant Irene Hand Corrigan.

Messrs. James S. Easby-Smith and David A. Pine, Attorneys for Plaintiff:

Please take notice that the foregoing will be for hearing on Friday, April 27, 1923, at 10 o'clock A. M., or as soon thereafter as counsel may be heard.

James P. Schick, Attorney for Defendant Irene Hand Corrigan.

[fol. 18] Received copy of the foregoing motion and notice this 25 day of April, 1923.

James S. Easby-Smith, David A. Pine, Attorneys for Plaintiff.

SUPREME COURT OF THE DISTRICT OF COLUMBIA

ORDER OVERRULING MOTION OF DEFENDANT IRENE HAND CORRIGAN TO DISMISS BILL—Filed April 27, 1923

* * * * * * *

This cause came on to be heard upon the motion of the defendant Corrigan to dismiss the bill of complaint herein and the same having been argued by counsel and submitted to the court, it is by the court this 27th day of April, A. D., 1923.

Adjudged, ordered and decreed: That the said motion be and the same hereby is overruled, and the said defendant Corrigan is hereby given leave to answer said bill of complaint within ten days of this date.

Walter I. McCoy, Chief Justice.

SUPREME COURT OF THE DISTRICT OF COLUMBIA

ELECTION OF DEFENDANT CORRIGAN TO STAND ON MOTION TO DISMISS—Filed May 4, 1923

* * * * * * *

Comes now the defendant Irene Hand Corrigan by her attorney and elects to stand on her motion to dismiss the bill of complaint filed herein.

James P. Schick, Attorney for Defendant Irene Hand Corrigan.

SUPREME COURT OF THE DISTRICT OF COLUMBIA

ELECTION OF DEFENDANT CURTIS TO STAND ON MOTION TO DISMISS—Filed May 4, 1923

* * * * * * *

Comes now the defendant, Helen Curtis, by her attorney and objecting to the action of the Court in overruling her Motion to Dismiss and saving an exception to said action, elects to stand on her said Motion to Dismiss the Bill of Complaint filed herein.

James A. Cobb, Attorney for Defendant Helen Curtis.

[fol. 19] SUPREME COURT OF THE DISTRICT OF COLUMBIA

DECREE—Filed May 8, 1923

* * * * * * *

This cause came on to be heard at this term upon the bill of complaint and the respective motions to dismiss the same filed herein by the respective defendants; and thereupon the said motions having been severally overruled and the said defendants having severally elected to stand on said motions, it is by the Court this 8th day of May, 1923,

Adjudged, ordered and decreed: That defendant Irene Hand Corrigan be and she hereby is permanently enjoined for and during the period of twenty-one years from and after the 1st day of June, 1921, from complying with or carrying out in any manner whatsoever all or any of the terms and provisions of that certain written contract of sale bearing date the 25th day of September, 1922, and entered into between said defendant Irene Hand Corrigan and the defendant Helen Curtis, otherwise known as Mrs. A. L. Curtis, by the terms of which said contract said defendant Curtis, under the name of Mrs. A. L. Curtis, did therein and thereby agree to purchase from said defendant Corrigan, and said defendant Corrigan did therein and thereby agree to sell to said defendant Curtis that certain piece and parcel of land lying and being in the City of Washington, District of Columbia known and described as Lot 20, Square 152, as recorded in the Surveyor's office of said District, and improved by a dwelling house and premises known as 1727 S Street, Northwest, of said City and District; and further that said defendant Irene Hand Corrigan be and she hereby is permanently enjoined during said period of time from directly or indirectly selling, or conveying or causing to be sold or conveyed to said defendant Helen Curtis, otherwise known as Mrs. A. L. Curtis, the said land and premises, and from making, signing, sealing or delivering to the said defendant Curtis a deed or any other form of conveyance of said land and premises.

It is further adjudged, ordered and decreed: That said defendant Helen Curtis, otherwise known as Mrs. A. L. Curtis, and her heirs and assigns be permanently enjoined during the period of twenty-one years from and after the 1st day of June, 1921, from taking title directly or indirectly from the defendant Corrigan to the hereinabove described land and premises and from using or occupying the same and from selling, conveying, leasing, renting or giving the same to, or permitting the same to be used or occupied by, any negro or negroes or persons of the negro race or blood.

Walter I. McCoy, Chief Justice.

From the foregoing decree the defendants in open court note an appeal to the Court of Appeals of the District of Columbia, and the [fol. 20] court thereupon fixed the cost bond on appeal in the sum of $100.00 or in lieu thereof a deposit of $50.00 in cash; this 8th day of May, 1923.

Walter I. McCoy, Chief Justice.

MEMORANDUM

May 23, 1923.—Undertaking on appeal filed.

SUPREME COURT OF THE DISTRICT OF COLUMBIA

ASSIGNMENTS OF ERROR—Filed June 18, 1923

* * * * * * *

The Court erred as follows:

1. In overruling and dismissing Defendants' Nos. 1 and 2 (Appellants') Motions to Dismiss Bill.

2. In granting a permanent injunction against Defendants' Nos. 1 and 2 (Appellants').

3. In holding the indenture or covenant set out in the Bill as not being void as against public policy.

4. In not holding to the contrary.

5. In refusing to hold the said indenture or covenant void in that it deprived the defendants, appellants, and others, of property without due process of law; abridged the privileges and immunities of citizens of the United States, including the defendants, appellants, Irene Hand Corrigan and Helen Curtis, and other persons within this jurisdiction; and denied to the said defendants, the said Irene Hand Corrigan and Helen Curtis, and other persons within this jurisdiction, the equal protection of the law; and therefore is forbidden by the Constitution of the United States and especially by the Fifth, Thirteenth and Fourteenth Amendments thereof, and the

Laws enacted in aid and under the sanction of said Fifth, Thirteenth, and Fourteenth Amendments.

6. In not holding to the contrary.

James P. Schick, James A. Cobb, Attorneys for Defendants-Appellants.

SUPREME COURT OF THE DISTRICT OF COLUMBIA

DESIGNATION OF RECORD—Filed June 18, 1923

* * * * * * *

The defendants, appellants, designate the following to constitute the record on their appeal in the above entitled cause:

1. Bill of Complaint with exhibits attached thereto.

2. Motion of Defendant No. 2 to dismiss Bill.

3. Opinion of Court.

[fol. 21] 4. Order overruling Motion to Dismiss Bill and Leave to Answer within ten (10) days.

5. Motion of Defendant No. 1 to dismiss Bill, Notice and Acknowledgment.

6. Order overruling Motion of Defendant No. 1 to Dismiss Bill.

7. Election of Defendant No. 1 to stand on Motion to Dismiss.

8. Election of Defendant No. 2 to stand on Motion to Dismiss.

9. Decree granting permanent injunction. Appeal noted.

10. Memorandum of filing and approving of bond on appeal.

11. Assignments of Error.

12. This Designation.

James P. Schick, James A. Cobb, Attorneys for Defendants-Appellants.

Service of a copy of the above Designation of Record is hereby acknowledged this 16 day of June, A. D., 1923.

David A. Pine, Attorney for Plaintiff-Appellee.

SUPREME COURT OF THE DISTRICT OF COLUMBIA

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 31, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 40702 in Equity, wherein John J. Buckley is Plaintiff and Irene Hand Corrigan et al. are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 24th day of September, 1923.

Morgan H. Beach, Clerk, by R. S. Wayland, Asst. Clerk.
E. W. (Seal of Supreme Court of the District of Columbia.)

[File endorsement omitted.]

[fol. 22] IN COURT OF APPEALS, D. C.

No. 4059

IRENE HAND CORRIGAN and HELEN CURTIS, Otherwise Known as Mrs. A. L. CURTIS, Appellants,

vs.

JOHN J. BUCKLEY

ARGUMENT—April 21st, 1924

The argument in the above entitled cause was commenced by Mr. James A. Cobb, attorney for the appellants, and was concluded by Mr. James S. Easby-Smith, attorney for the appellee.

[fol. 23] IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

[Title omitted]

Before Robb and Van Orsdel, Associate Justices; Barber, Judge United States Court of Customs Appeals

OPINION

Mr. Justice Van Orsdel delivered the Opinion of the Court:

VAN ORSDEL, Associate Justice:

Appellee, plaintiff below, filed a bill of complaint to restrain defendant, Corrigan, from conveying to defendant, Curtis, certain real estate in the District of Columbia, and to prevent the latter from occupying the same, in violation of a covenant affecting the title to said land, and to compel specific performance of the covenant.

It is alleged in the bill that plaintiff owns an undivided interest in Lot 74, Square 152, improved by a dwelling house. Defendant Corrigan is the owner of Lot 20, Square 152, on which is situated a [fol. 24] dwelling house; that on June 1, 1921 plaintiff and defendant Corrigan, together with 28 other persons, who were owners of land improved by dwelling houses adjacent to and in the same immediate neighborhood, as the above property described, mutually executed and delivered a covenant which was recorded in the Office of the Recorder of Deeds of the District of Columbia, which, after describing the location of the property as a whole, and expressing the desire of the parties to further the interests of said community and neighborhood, provided, that "in consideration of the premises and the sum of Five Dollars ($5.00) each to the other in hand paid, the parties hereto do hereby mutually covenant, promise and agree each to the other and for their respective heirs and assigns, that no part of the land now owned by the parties hereto, a more detailed description of said property being given after the respective signatures hereto, shall ever be used or occupied by, or sold, conveyed, leased, rented, or given, to Negroes, or any person or persons of the Negro race or blood. This covenant shall run with the land and bind the respective heirs and assigns of the parties hereto for the period of twenty-one (21) years from and after the date of these presents."

Plaintiff alleged that thereafter defendant Corrigan entered into a [fol. 25] contract with defendant Curtis to sell to the latter a house and lot belonging to the former and included within the covenant; that defendant Curtis is a person of the Negro race and blood, and before making the contract had knowledge of the existence and terms of the covenant, and that in executing the contract of sale plaintiff had acted in violation of the terms and conditions of the covenant. Plaintiff alleges that if the conveyance is made in accordance with the contract of sale, irreparable injury will be done to plaintiff and to other persons who are parties to the indenture or covenant; that plaintiff is without any plain adequate and complete remedy at law,

and that plaintiff is entitled to specific performance of the covenant by means of injunction preventing the defendant from carrying into effect the contract of sale.

Plaintiff accordingly prayed that defendant Corrigan be enjoined for twenty-one years from the date of the covenant, from carrying out the contract of sale with defendant Curtis; and that Curtis be permanently enjoined, during the same period of time, from taking title to the land and from occupying, selling, conveying, leasing, renting, or giving the same to a negro, or permitting the same to be used or occupied by any negro.

Defendant Curtis filed a motion to dismiss the bill on the ground [fol. 26] that the covenant is void, in that it deprives defendant and others of property without due process of law, abridges the privileges and immunities of citizens of the United States, and denies the defendants equal protection of the law. The court below denied the motion to dismiss the petition, and defendants electing to stand upon their motion, a decree of injunction was entered from which this appeal was taken.

Appellant seems to have misconceived the real question here involved. We are not dealing with the validity of a statute, or municipal law, or ordnance; nor are we concerned with the right of a negro to acquire, own, and use property; nor are we confronted with any pre-existing rights which are affected by the covenant here in question. The sole issue is the power of a number of land owners to execute and record a covenant running with the land by which they bind themselves, their heirs and assigns, during a period of twenty-one years, to prevent any of the land described in the covenant from being sold, leased to, or occupied by, negroes.

The constitutional right of a negro to acquire, own, and occupy property does not carry with it the constitutional power to compel sale and conveyance to him of any particular private property. The individual citizen, whether he be black or white, may refuse to sell or lease his property to any particular individual or class of indi- [fol. 27] viduals. The state alone possesses the power to compel a sale or taking of private *private* property, and that only for public use. The power of these property owners to exclude one class of citizens, implies the power of the other class to exercise the same prerogative over property which they may own. What is denied one class may be denied the other. There is, therefore, no discrimination within the Civil Rights clauses of the Constitution. Such a covenant is enforcible not only against a member of the excluded race, but between the parties to the agreement.

Our attention has not been called to any decision of the Supreme Court of the United States involving the exact question before us. It has, however, been before the courts of the States where it has been held that similar covenants against ownership or occupancy by negroes are neither unconstitutional nor contrary to public policy. Parmalee et al. v. Morris, 218 Mich. 625; Queensboro Land Co. v. Cazeaux, 136 La. 724; Los Angeles Investment Co. v. Gary, 181 Calif. 680; Koehler v. Rowland, 275 Mo. 573.

It is unnecessary to consider the contention that the restriction amounts to a denial of equal protection of the laws under the 14th Amendment, since the Supreme Court has held in numerous instances, that the inhibition is upon the power of the State and not to [fol. 28] action by individuals in respect of their property. United States v. Cruikshank, 92 U. S. 542; Virginia v. Rives, 100 U. S. 313; United States v. Harris, 106 U. S. 629; Civil Rights Cases, 109 U. S. 31.

In Plessy v. Ferguson, 163 U. S. 537, the court, sustaining the validity of a statute of Louisiana, providing for separation of races in passenger cars, as not being repugnant to the provisions of the 14th Amendment, said:

"The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish the distinctions based on color, or to enforce social, as distinguished from political equality, or a co-mingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the State legislatures in the exercise of their police power."

The foregoing rule applies not only to segregation in railway coaches but to statutes requiring separate white and colored schools, [fol. 29] as well as regulations providing for the segregation of the races in municipal play grounds, municipal golf courses, municipal tennis courts, and municipal bathing beaches. The same general and settled public opinion controls in respect of the segregation of the races in churches, hotels, restaurants, lodging houses, apartment houses, theaters, and places of public amusement.

It follows that the segregation of the races, whether by statute or private agreement, where the method adopted does not amount to the denial of fundamental constitutional rights, cannot be held to be against public policy. Nor can the social equality of the races be attained either by legislation or by the forcible assertion of assumed rights. As was said in People v. Gallagher, 93 N. Y. 438, 448:

"This can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the Government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all the functions respecting social advantages with which it is endowed."

Defendant claims protection under certain legislation of Congress. As suggested in the opinion of the learned trial justice, this legisla- [fol. 30] lation was enacted to carry into effect the provisions of the Constitution. The statutes, therefore, can afford no more protection than the Constitution itself. If, therefore, there is no in-

fringement of defendant's rights under the Constitution, there can be none under the statutes.

The decree is affirmed with costs.

Josiah A. Van Orsdel, Associate Justice.

[fol. 31] In Court of Appeals, D. C.

Decree—June 2nd, 1924

[Title omitted]

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. Justice Van Orsdel, June 2, 1924.

Judge Orion M. Barber of the U. S. Court of Customs Appeals sat in this case with Mr. Justice Robb and Mr. Justice Van Orsdel.

[fol. 32] In the Court of Appeals of the District of Columbia

[Title omitted]

Petition for Appeal—Filed June 5, 1924

Come now the appellants in the above entitled cause and respectfully show that on or about the 2nd day of June, 1924, this Court entered a decree herein in favor of the appellee and against the appellants, affirming the decree of the Supreme Court of the District of Columbia in favor of appellee, in which decree of the Court of Appeals certain errors were committed to the prejudice of the appellants, all of which will appear more in detail from the assignments of error filed with this petition.

The appellants further show that the decree of the Court of Appeals in this case is subject to review by the Supreme Court of the United States under the provisions of paragraph 3 of section 250 of the Judicial Code in that the construction or application of the Constitution of the United States is involved.

The appellants further show that the decree of the Court of Appeals is reviewable by the Supreme Court of the United States under the provisions of paragraph 6 of said section 250 of the Judicial Code, in that the construction of certain acts of Congress, to wit, Sections 1977, 1978, and 1979, Revised Statutes of the United

States were drawn in question by the appellants who were the defendants below, and who asserted and relied upon a construction of said statutes contrary to that placed thereon by the Court of Appeals [fol. 33] in its decree herein.

Wherefore appellants pray that an appeal be allowed in this behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, and that the mandate of this court be stayed until further order. That the bond, to act as supersedeas, be fixed at $300.

Irene Hand Corrigan and Helen Curtis, otherwise known as Mrs. A. L. Curtis, by their attorneys, Henry E. Davis, James A. Cobb, James P. Schick, Attorneys.

[fol. 34] In the Court of Appeals of the District of Columbia

[Title omitted]

Assignments of Error—Filed June 5, 1924

And now come the appellants by their attorneys and say that in the record and proceedings of the Court of Appeals in the above-entitled cause and in the rendition of final decree therein, manifest error has intervened, to the prejudice of said appellants, in this:

1. The court erred in affirming the decree of the court below.

2. The court erred in not reversing the decree of the court below.

3. The court erred in holding that the indenture or covenant set out in appellee's bill of complaint is not void as against public policy.

4. The court erred in not holding to the contrary.

5. The court erred in not holding that the said indenture or covenant is void in that it deprives the defendants, appellants, and others, of property without due process of law.

6. The court erred in holding to the contrary.

7. The court erred in not holding that the said indenture or covenant is void in that it abridged the privileges and immunities of citizens of the United States, including the defendants, appellants, Irene Hand Corrigan and Helen Curtis, and other persons within this jurisdiction.

[fol. 35] 8. The court erred in holding to the contrary.

9. The court erred in not holding that the said indenture or covenant is void in that it denied to the said defendants, the said Irene Hand Corrigan and Helen Curtis, and other persons within this jurisdiction, the equal protection of the law.

10. The court erred in holding to the contrary.

11. The court erred in not holding that the said indenture or covenant is void in that it is forbidden by the Constitution of the United States and especially by the Fifth, Thirteenth and Fourteenth Amendments thereof, and the Laws enacted in aid and under the sanction of the said Fifth, Thirteenth, and Fourteenth Amendments.

12. The court erred in holding to the contrary.

Irene Hand Corrigan and Helen Curtis, otherwise known as Mrs. A. L. Curtis, Appellants, by Henry E. Davis, James A. Cobb, James P. Schick, Their Attorneys.

Service acknowledged this 5th day of June A. D., 1924. David A. Pine, Attorney for Appellee.

[fol. 36] [File endorsement omitted.]

[fol. 37] In Court of Appeals of District of Columbia

[Title omitted]

Order Allowing Appeal—June 7th, 1924

On consideration of the petition for the allowance of an appeal to the Supreme Court of the United States in the above entitled cause, it is ordered by the Court that said appeal be, and the same is hereby, allowed, and the bond to act as supersedeas is fixed at the sum of three hundred dollars.

[fol. 38] Bond on Appeal for $300—Approved and filed June 13, 1924; omitted in printing

[fol. 39] [File endorsement omitted.]

[fol. 40] Citation—In usual form, showing service on James S. Easby-Smith; filed June 13, 1924; omitted in printing

[fol. 41] [File endorsement omitted.]

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 104.

IRENE HAND CORRIGAN and HELEN CURTIS,

Appellants,

against

JOHN J. BUCKLEY,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

APPELLANTS' POINTS.

JAMES A. COBB,
HENRY E. DAVIS,
WILLIAM H. LEWIS,
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Subject Index.

CASES CITED.

PAGE

PAGE

STATUTES AND TEXT BOOKS.

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 104.

IRENE HAND CORRIGAN and HELEN CURTIS, Appellants, against JOHN J. BUCKLEY, Appellee.	Appeal from the Court of Appeals of the District of Columbia.

APPELLANTS' POINTS.

The appellee filed a bill in equity in the Supreme Court of the District of Columbia in which he sought a permanent injunction against the defendant Irene Hand Corrigan, restraining her "from directly or indirectly selling and conveying or causing to be sold and conveyed to the defendant Helen Curtis" certain land in the City of Washington pursuant to a contract entered into, from making and delivering a deed or any other form of conveyance of the land to the defendant Helen Curtis, and enjoining the latter, her heirs and assigns, for the period of twenty-one years from taking title, directly or indirectly, to such land, and from using or occupying it and from selling, conveying, leasing, renting or giving the same to or permitting the same to be used or occupied by any negro or negroes or person or persons of the negro race or blood (*Rec.*, pp. 5, 6).

The facts set forth in the bill and upon which this prayer for equitable relief is based are undisputed. The

appellee is the owner of premises known as 1719 S Street, N. W., Washington. The appellant Irene Hand Corrigan was the owner of premises known as 1727 S Street, N. W., Washington. On June 1, 1921, Buckley, Mrs. Corrigan and twenty-eight other persons, all of whom at the time owned twenty-three other parcels of land improved by dwelling houses adjacent and contiguous to and in the same immediate neighborhood as the lands of the appellee and Mrs. Corrigan and severally situated on both the north and south sides of S Street between New Hampshire Avenue and 18th Street, N. W., in the City of Washington, entered into a covenant which is set forth in the *Record* at pages 6-9.

This instrument, after reciting that the parties who executed it *are the owners* of real estate located in the District described and that they "desire, for their mutual benefit, as well as for the best interests of the said community and neighborhood, to improve—in any legitimate way further the interests of said community," provides that the parties thereto mutually covenant, promise and agree with each other and for their respective heirs and assigns "that no part of the land now owned by the parties hereto, a more detailed description of said property being given after the respective signatures hereto, shall *ever* be used or occupied by or sold, conveyed, leased, rented, or given, to Negroes or any person or persons of the Negro race or blood. This covenant shall run with the land and bind the respective heirs and assigns of the parties hereto for the period of twenty-one (21) years from and after the date of these presents."

All the persons who executed this covenant are white persons, a large number of whom occupied, resided in and made their homes, and continued to occupy, reside and make their homes in the premises described (*Rec.*, p. 2).

On September 26, 1922, Mrs. Corrigan entered into a sales contract with Mrs. Curtis, by which the latter agreed to purchase from Mrs. Corrigan and she agreed to sell

and convey to Mrs. Curtis the premises 1727 S Street, Northwest, which instrument was duly recorded in the office of the Recorder of Deeds of the District of Columbia (*Rec.*, pp. 3, 9, 10). Mrs. Curtis is a person of the Negro race and blood.

A number of parties to the covenant thereupon "objected and protested to the defendant Corrigan against the execution or carrying out by her of the terms and provisions of said contract of sale," but on November 8, 1922, she definitely stated "that she would not fight the said contract of sale, that is to say, would not refuse to execute and carry out the terms and conditions thereof, nor would she refuse to sell and convey to the defendant Curtis the land and premises involved as aforesaid, nor would she refuse to make, sign, seal and deliver a deed to the same to said defendant last named, * * * and now is threatening to execute and carry out and is about to execute and carry out the terms and provisions of the aforesaid contract of sale and in pursuance thereof to sell and convey to the defendant Curtis the land and premises involved as aforesaid and to make, sign, seal and deliver a deed to the same to said defendant Curtis" (*Rec.*, pp. 4, 5).

After setting forth these facts, the bill of complaint alleges (*Rec.*, p. 5):

> "14. That if the threats aforesaid are fulfilled and carried out and the defendant sells and conveys to the defendant Curtis the said land and premises and makes, signs, seals and delivers a deed to the same to said defendant Curtis, irreparable injury will be done to the plaintiff and to the other persons who are parties to the aforesaid indenture or covenant and that plaintiff has no plain, adequate or complete remedy at law; *and plaintiff further avers that he is entitled to specific performance on the part of the defendant Corrigan of her said agreements and cove*

nants as set out in the said Indenture or Covenant mentioned and described in paragraph 6 of this bill and to have the terms and provisions of said Indenture or Covenant specifically enforced in equity by means of an injunction preventing both the said defendants Corrigan and Curtis from carrying into effect the said contract of sale mentioned and described in paragraph 7 of this bill."

Mrs. Curtis moved to dismiss the bill of complaint on the grounds that the alleged indenture or covenant was void, in that it attempts to deprive her and others of property without due process of law; abridges the privileges and immunities of citizens of the United States, and other persons within this jurisdiction, of the equal protection of the law, and is forbidden by the Fifth, Thirteenth and Fourteenth Amendments to the Constitution of the United States and the laws enacted in aid and under the sanction of the Thirteenth and Fourteenth Amendments (*Rec.*, p. 11).

As appears from the opinion of the Supreme Court of the District of Columbia "the defendant urges very strongly in her brief that such a restriction is against public policy and the point is perhaps one that should be considered" (*Rec.*, p. 14). The Court thereupon discussed at length this point and passed upon it, and decided it adversely to the contention of Mrs. Curtis.

Mrs. Corrigan also moved to dismiss the complaint on the ground that the alleged indenture is void, that it is contrary to and in violation of the Constitution of the United States, and that it "is void in that the same is contrary to public policy" (*Rec.*, p. 17).

Both of these motions were overruled and both of the parties electing to stand on their motions to dismiss the Court permanently enjoined both of them in conformity with the prayer of the bill of complaint (*Rec.*, pp. 17-19).

An appeal was thereupon taken by both defendants to

the Court of Appeals of the District of Columbia, where error was assigned not only on the ground of the constitutional questions above stated, but also that the Court erred in holding that the covenant set out in the bill was not void as against public policy and in not holding to the contrary (*Rec.*, p. 19). The Court of Appeals affirmed the decree of the Supreme Court (*Rec.*, p. 25), and thereafter an appeal to this Court was allowed (*Rec.*, pp. 25-27).

Assignments of Error.

Among the Assignments of Error are the following (*Rec.*, p. 26):

> "3. The Court erred in holding that the indenture or covenant set out in appellee's bill of complaint is not void as against public policy."
>
> "4. The Court erred in holding to the contrary."
>
> "5. The Court erred in not holding that the said indenture or covenant is void in that it deprives the defendants, appellants, and others, of property without due process of law."
>
> "6. The Court erred in holding to the contrary."
>
> "7. The Court erred in not holding that the said indenture or covenant is void in that it abridged the privileges and immunities of citizens of the United States, including the defendants, appellants, Irene Hand Corrigan and Helen Curtis, and other persons within this jurisdiction."
>
> "8. The Court erred in holding to the contrary."
>
> "9. The Court erred in not holding that the said indenture or covenant is void in that it denied to the said defendants, the said Irene Hand Corrigan and Helen Curtis, and other persons within this jurisdiction, the equal protection of the law."
>
> "10. The Court erred in holding to the contrary."

"11. The Court erred in not holding that the said indenture or covenant is void in that it is forbidden by the Constitution of the United States and especially by the Fifth, Thirteenth and Fourteenth Amendments thereof, and the laws enacted in aid and under the sanction of the said Fifth, Thirteenth and Fourteenth Amendments."

"12. The Court erred in holding to the contrary."

POINTS.

I.

The decrees of the Courts below constitute a violation of the Fifth and Fourteenth Amendments to the Constitution, in that they deprive the appellants of their liberty and property without due process of law.

This proposition is the legitimate and logical consequence of the unanimous decision rendered by this Court in *Buchanan* v. *Warley*, 245 U. S., 60. There it was attempted, by legislation in the form of a city ordinance, to forbid colored persons from occupying houses as residences, or places of abode, or public assembly, on blocks where the majority of the houses were occupied by white persons for those purposes, and in like manner forbidding white persons when the conditions as to occupancy were reversed, and which based the interdiction upon color and nothing more.

Here the decrees of the Supreme Court and the Court of Appeals of the District of Columbia have forbidden Mrs. Corrigan, a white person, from selling to Mrs. Curtis, a colored person, and Mrs. Curtis from buying, a house in the residential district of Washington, solely because Mrs. Curtis is of Negro race or blood, and forbidding Mrs. Curtis, her heirs and assigns, for a period of twenty-one years, from taking title to this property, from

using or occupying it, and from selling, conveying, leasing, renting or giving it to or permitting it to be used or occuped by any Negro or Negroes or persons of the Negro race or blood.

The question that was to be determined in *Buchanan* v. *Warley* was thus stated by Mr. Justice Day (p. 75):

> "The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of property *of which occupancy is an incident*, be inhibited by the State, or by one of its municipalities, solely because of the color of the proposed occupant of the premises?"

In the course of the discussion of this proposition, it was said:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. *Holden* v. *Hardy*, 169 U. S., 366, 391. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land. 1 Blackstone's Commentaries (Cooley's Ed.), 127."

The opinion then considers the history of the Thirteenth and Fourteenth Amendments, quoting from the *Slaughter House* Cases, 16 Wall., 36; *Strauder* v. *West Virginia*, 100 U. S., 303, and *Ex parte Virginia*, 100 U. S., 339, 347.

A part of the quotation from *Strauder* v. *West Virginia* consisted of these passages (p. 77):

> "What is this (the Fourteenth Amendment) but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the

> laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? * * * The Fourteenth Amendment makes no attempt to enumerate the rights its designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any State action that denies this immunity to a colored man is in conflict with the Constitution."

The quotation from *Ex parte Virginia, supra,* is especially important:

> "Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State."

It is proper to pause at this point to refer to the decision in *Virginia* v. *Rives,* 100 U. S., 313, rendered concurrently with *Ex parte Virginia,* where Mr. Justice Strong said:

> "It is doubtless true that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions

whenever they are disregarded by either the Legislative, the Executive, or the Judicial Department of the State."

We add a further quotation from the opinion in *Ex parte Virginia* (pp. 346, 347):

> "We have said the prohibitions of the Fourteenth Amendment are addressed to the States. * * * They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive *or its judicial authorities.* It can act in no other way."

In *United States* v. *Harris,* 106 U. S., 629, 639, this Court said:

> "When the State has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; *when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress.*"

So in *Scott* v. *McNeal,* 154 U. S., 34, it was held that the prohibitions of the Amendment extended to "all acts of the State, whether through its legislative, its executive, or its judicial authorities."

And in *Chicago, Burlington & Quincy R. R. Co.* v. *Chicago,* 166 U. S., 226, 233, Mr. Justice Harlan, said:

"But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a State government deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State."

Further Mr. Justice Harlan says (pp. 234, 235):

"But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form."

See also *Home Telephone & Telegraph Co.* v. *Los Angeles*, 227 U. S., 278, where it was again declared that these provisions of the Constitution are generic in terms and are addressed not only to the States, but to every person, whether natural or judicial, who is the repository of State power, and that their reach is co-extensive with any exercise by a State of power in whatever form asserted.

The same effect has been given to the due process clause of the Fifth Amendment to the Constitution. Seventy years ago, in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How., 276, Mr. Justice Curtis said:

"It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative

as well as on the executive *and judicial powers of the Government.*"

In *Hovey* v. *Elliott,* 167 U. S., 409, this Court was called upon to determine the effect of an order rendered by the Supreme Court of the District of Columbia at General Term in a contempt proceeding, which decreed that the defendants' answer be stricken out and removed from the files of the court because of non-compliance on their part with the requirements of a decree previously rendered by the court, and that the cause should then proceed as if no answer had been interposed. It was held that the action of the court was a violation of the Fifth Amendment. Mr. Justice White, in the course of his comprehensive opinion, said:

> "To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends" (p. 414).

Again, on page 417, he said, in words which could be well applied here:

> "If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? *If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative*

sanction would be violative of the Constitution? If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice courts possess the right to inflict the very wrongs which they were created to prevent."

Returning to the opinion in *Buchanan* v. *Warley*, supplemented by these utterances, which include in the constitutional inhibition not merely executive and legislative invasions of the right sought to be protected, but also those of the judicial arm of the Government, we find that, in giving legislative aid to these constitutional provisions, Congress made two statutory declarations, which constitute Sections 1977 and 1978 of the United States Revised Statutes. The first of these reads:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and no other."

Section 1978 declares:

> "All citizens of the United States shall have the same right in every State and Territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

After referring to the authorities and statutes cited by

him, Mr. Justice Day very appropriately asked: "In the face of these constitutional and statutory provisions, can a white man be denied, consistently with due process of law, the right to dispose of his property to a purchaser by prohibiting *the occupation* of it for the sole reason that the purchaser is a person of color intending *to occupy* the premises as a place of residence?" He answered (p. 78):

> "The statute of 1866, originally passed under sanction of the Thirteenth Amendment, 14 Stat., 27, and practically reenacted after the adoption of the Fourteenth Amendment, 16 Stat., 144, expressly provided that all citizens of the United States in any State shall have the same right to purchase property as is enjoyed by white citizens. Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color. *Hall* v. *DeCuir*, 95 U. S., 485, 508. These enactments did not deal with the social rights of men, but with those fundamental rights in property which it was intended to secure upon the same terms to citizens of every race and color. *Civil Rights Cases*, 109 U. S., 3, 22. The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without State legislation discriminating against him solely because of color."

The opinion then refers to and distinguishes *Plessy* v. *Ferguson*, 163 U. S., 537, and other cases, which will be considered later.

The final paragraph of the opinion states the deliberate conclusion of this Court:

> "We think this attempt to prevent alienation of the property in question to a person of color was not a legitimate exercise of the police power of the

> State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing State interference with property rights except by due process of law. That being the case the ordinance cannot stand."

We have, therefore, the solemn pronouncement of this tribunal, that it was not within the legislative power of the State, or any of its instrumentalities, to forbid Mrs. Corrigan from selling her house to Mrs. Curtis, or the latter from purchasing and occupying it.

For the reasons considered in *Buchanan* v. *Warley*, it would have been beyond the legislative power to have enacted that a covenant in the precise terms of that involved in the present case should be enforceable by the courts by suit in equity and by means of a decree of specific performance, an injunction, and proceedings for contempt for failure to obey the decree. It seems inconceivable that, so long as the legislature refrains from passing such an enactment, a court of equity may, by its command, compel the specific performance of such a covenant, and thus give the sanction of the judicial department of the Government to an act which it was not within the competency of its legislative branch to authorize.

As has been shown, this court has repeatedly included the judicial department within the inhibitions against the violation of the constitutional guaranties which we have invoked.

We cannot emphasize too strongly that the immediate consequence of the decrees now under review is to bring about that which the legislative and executive departments of the Government are powerless to accomplish. It would seem to follow that by these decrees the appellants have been deprived of their liberty and property, not by individual, but by governmental action. These decrees have all the force of a statute. They have behind them the sovereign power. It is not Buckley, the appellee, but the sovereignty, which speaks through the Court, that has issued

a mandate to the appellants which prevents Mrs. Corrigan from selling, leasing or giving her property to Mrs. Curtis, and the latter from acquiring and occupying the property, simply because she is of the negro race or blood.

In rendering these decrees, the Courts which have pronounced them have functioned as the law-making power. It is they who are seeking to effectuate the policy of racial segregation based on color. They have virtually announced to all colored persons: "You shall not inherit, purchase, lease, sell or hold real property for the acquisition of which you have entered into a contract, simply because you are of the negro race or blood." They have told those of the white race who have entered into a covenant such as is referred to in the decrees: "You shall not sell, lease or give your property to any person of the negro race or blood."

They have practically declared: "If the owners of property in a particular locality, however extensive its area may be, see fit to agree on such a policy of segregation, these Courts, sitting in equity, may nevertheless by their decrees enforce such a policy, even if it be conceded that they would be prohibited from doing so by the decision of the Supreme Court of the United States if the legislative branch of the Government had established a like policy."

To test the incongruity of such a situation, let us suppose that after the decision in *Buchanan* v. *Warley* the Common Council of the City of Louisville had adopted an ordinance permitting the residents of the same districts which were affected by the ordinance which this Court had declared unconstitutional, to enter into a covenant in the precise terms of that which the Courts below have enforced in this case, would it not at once have been said that it was an intolerable invasion of the Constitution as interpreted by this Court. But that is exactly what has been done in the present case by the adjudications which are now here for review.

Or let us suppose, that after the rendition of these de-

crees, Mrs. Corrigan, standing on her constitutional rights, had executed a deed of the premises here in question to Mrs. Curtis, and the latter had proceeded to occupy them, would it have been within the competency of the court to have imprisoned either or both of them as for a contempt of court? The exercise by the Court of its power to enforce its decrees through the medium of contempt proceedings, would be nothing more or less than the enforcement of the policy of racial segregation based on color, in violation of the letter and spirit of the Constitution as interpreted in *Buchanan* v. *Warley*.

After *Buchanan* v. *Warley* had been remanded by this Court to the Kentucky Court of Appeals for further proceedings not inconsistent with the opinion rendered, would this Court have countenanced an amendment of the decree which it had reversed, providing that ninety per cent. of the residents of the district in which segregation had been attempted might enter into a covenant in precisely the same terms as the ordinance and that, thereupon, such covenant should be in full force and effect?

In *Gondolfo* v. *Hartman*, 49 Fed. Rep., 181, Judge Ross said (p. 182):

> "It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restrictive application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while the State and municipal legislatures are forbidden to discriminate against the Chinese in their legislation, a citizen of the State may lawfully do so by contract, which the *Courts may enforce*. Such view is, I think, entirely inadmissible. Any result inhibited by the Constitution can no more be accomplished by contract of individual citizens than by legislation, and the Court should no more enforce the one than the other. This would seem to be very clear."

After citing *Kennett* v. *Chambers,* 14 How., 49, the opinion continues (p. 183):

> "But the principle governing the case is, in my opinion, equally applicable here, where it is sought to enforce an agreement made contrary to the public policy of the government, and in violation of the principles embodied in its Constitution. Such a contract is absolutely void and should not be enforced in any court, certainly not in a court of equity of the United States."

In *Plessy* v. *Ferguson,* as pointed out by this Court, there was no attempt to deprive all persons of color of transportation in the coaches of a public carrier. The express requirements of the statute there challenged were for equal, though separate, accommodations for the white and colored races.

On the other hand, in *McCabe* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 235 U. S., 151, a statute which allowed railroad companies to furnish dining cars for white people and to refuse to furnish them for colored people, was held to be unconstitutional.

The Applicability of Constitutional Amendments to the District of Columbia.

In the opinion rendered by the Supreme Court of the District of Columbia in the present case it was suggested (*Rec.*, p. 12) that the Court of Appeals of the District had held that the Fourteenth Amendment was not in force in the District of Columbia, citing *Siddons* v. *Edmonston,* 42 App. D. C., 459; at the same time adding that since the provisions of that Amendment are, so far as concerns the question here involved, as broad at least as those of the Fifth and Thirteenth Amendments and if the provisions of the Fourteenth Amendment would not, if applicable, sustain the defendants' contention, it was unnecessary

to consider the other two Amendments (*District of Columbia* v. *Brooke*, 214 U. S., 138, 149). In that view of the case, the Court decided that the Fourteenth Amendment did not sustain the defendants' contention.

We have already considered that aspect of the subject. We deem it appropriate, however, to call attention to the decisions which we contend render applicable to the District of Columbia the several constitutional amendments to which reference has been made.

In *Downes* v. *Bidwell*, 182 U. S., 244, 259, 263, the applicability of the Constitution to the District of Columbia was exhaustively considered. Referring to *Loughborough* v. *Blake*, 5 Wheat., 317, attention was called to the fundamental fact that the District of Columbia consisted of territory which had been originally a part of the States of Maryland and Virginia. Subsequently, in 1846, the portion of the territory granted by Virginia was retroceded to that State (9 U. S. St. L., 35; *Evans* v. *United States*, 31 App. D. C., 544). Therefore the territory that now constitutes the District of Columbia was Maryland territory. Consequently, as said by Mr. Justice Brown:

> "It had been subject to the Constitution and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the States of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the Federal and State governments to a formal separation. The mere cession of the District of Columbia to the Federal government relinquished the authority of the States, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act, affecting its inhabitants, it would have been void.

> If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly by carving out the District what it could not do directly. The District still remained a part of the United States, protected by the Constitution. Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the Federal government."

It was accordingly held that Article I, Section 8, of the Constitution, which gave Congress the power "to lay and collect taxes, imposts and excises" which "shall be uniform throughout the United States," extended to the District of Columbia. This conclusion, so far as it affected the District of Columbia, was approved in the opinion of Mr. Justice Brown, although he and four other Justices of this Court did not consider the constitutional provision there under consideration as applicable to the Territories. On the other hand, however, the members of the Court who were in the minority, namely, Chief Justice Fuller, Mr. Justice Harlan, Mr. Justice Brewer and Mr. Justice Peckham, went even further than Mr. Justice Brown, and held that the constitutional provision followed the flag and operated throughout "the geographical unit known as the United States," "our great Republic, which is composed of States and Territories" (182 U. S., 356). *It follows that a majority of the Court recognized that the Constitution applied to the District of Columbia.*

It has been held expressly that the Fourth Amendment, relating to searches and seizures, *Stoutenburgh* v. *Frazier,* 16 App. D. C., 229, *Curry* v. *District of Columbia,* 14 App. D. C., 423; the Fifth Amendment, *Wight* v. *Davidson,* 181 U. S., 371, *Moses* v. *United States,* 16 App. D. C., 428; the Eighth Amendment, concerning excessive bail, fines and unusual punishments, *Stoutenburgh* v. *Frazier,* 16 App. D. C., 229; and the provisions relating to jury trials, *Cal-*

lan v. *Wilson*, 127 U. S., 540, are all applicable to the District of Columbia.

In *Curry* v. *District of Columbia, supra*, the Court said:

> "No more in the District of Columbia than anywhere else within the United States, could the legislature of the Union pass a bill of attainder or an *ex post facto* law, or dispense with trial by jury, or establish a religion, or authorize unreasonable searches. All the general limitations imposed by the Constitution upon its authority are as applicable in the District of Columbia as in any other part of the United States. And not only are these express limitations applicable, but * * * all the 'implied limitations which grow out of the nature of all free governments' are equally applicable. The 'exclusive' power of legislation over this District which is vested in Congress by the Constitution, must be assumed to extend only to all lawful subjects of legislation; and invasions of those fundamental individual rights, which lie at the foundation of the social compact, and for the maintenance of which free governments exist, are not lawful subjects of legislation."

In *Lappin* v. *District of Columbia*, 22 App. D. C., 68, 75, Mr. Justice Shepard said:

> "It must be conceded that the Fourteenth Amendment, which expressly declares that no State shall deny to any person within its jurisdiction the equal protection of the laws, does not purport to extend to authority exercised by the United States. But it does not follow that Congress in exercising its power of legislation within and for the District of Columbia may, therefore, deny to persons residing therein the equal protection of the laws. All of the guaranties of the Constitution respecting life, liberty, and prop-

erty are equally for the benefit and protection of all citizens of the United States residing permanently or temporarily within the District of Columbia, as of those residing in the several States. *Callan* v. *Wilson*, 127 U. S., 540; *United States ex rel. Kerr* v. *Ross*, 5 App. D. C., 241, 247; *Curry* v. *District of Columbia*, 14 App. D. C., 423."

In *Callan* v. *Wilson, supra*, Mr. Justice Harlan said (p. 549):

> "And as the guarantee of a trial by jury, in the third article, implied a trial in that mode and according to the settled rules of the common law, the enumeration in the Sixth Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and so far as the agencies of the General Government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty and property. This recognition was demanded and secured for the benefit of all the people of the United States, as well those permanently or temporarily residing in the District of Columbia, as those residing or being in the several States. There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty and property—especially of the privilege of trial by jury in criminal cases."

In the opinion of Mr. Justice Brown in *Downes* v. *Bidwell, supra*, *Callan* v. *Wilson* was declared to be in line with *Loughborough* v. *Blake*.

In *Smoot* v. *Heyl*, 227 U. S., 518, which related to the

validity of a building regulation adopted by the Commissioners of the District of Columbia, which was challenged on the ground that it was "unconstitutional and void because its effect is to deprive your complainants of their property without due process of law and just compensation," this Court, in assuming jurisdiction, necessarily decided that the due process clause of the Constitution was applicable to the District of Columbia; and in the subsequent case of *Walker* v. *Gish*, 260 U. S., 447, in which the validity of a regulation relating to party walls in the City of Washington was challenged on the same ground, this Court likewise considered the due process clause as applicable to the District of Columbia.

In *Block* v. *Hirsh*, 256 U. S., 135, in which the constitutionality of the Rent Laws of 1919 enacted for the District of Columbia was attacked on the ground that they involved the taking of property not for public use and without due process of law, this Court elaborately discussed their constitutionality; as it did in *Chastleton Corporation* v. *Sinclair*, 264 U. S., 543, that of the act passed in 1922, whereby it was attempted to extend the duration of these laws.

In *Adkins* v. *Children's Hospital*, 261 U. S., 525, which related to the constitutionality of the District of Columbia Minimum Wage Law, this Court declared the law to be in contravention of the Constitution, particularly of the due process clause of the Fifth Amendment.

When, therefore, the Court below (*Rec.*, p. 12), in the face of these decisions, based its assertion that the Fourteenth Amendment was not in force in the District of Columbia, on the alleged authority of *Siddons* v. *Edmonston*, 42 App. D. C., 459, it is not surprising that we find that the Court there confined itself to a bald statement which as the context shows was clearly *obiter*,

> "The prohibition in this Amendment, to which the appellee refers, applies to the States and not to the District of Columbia."

It is, however, surprising that the citation in support of that assertion is *District of Columbia* v. *Brooke,* 214 U. S., 138, when it distinctly appears that in that case, this Court declared it to be unnecessary to determine whether or not the Fourteenth Amendment applied to the District of Columbia, because it was conceded that the Fifth Amendment unquestionably did, and that it was not more extensive in its provisions than the Fourteenth Amendment. Therefore, reaching the conclusion that the legislation which was challenged on the ground that it denied the equal protection of the laws, merely involved such classification as had frequently been regarded as permissible under the Fourteenth Amendment, it was upheld as constitutional.

Hence, this Court did not in *District of Columbia* v. *Brooke* render a decision warranting its citation as authority for the proposition asserted.

It would seem, however, that if, as adjudged in *Loughborough* v. *Blake* and *Downes* v. *Bidwell,* the Constitution became irrevocably attached to the land which originally was a part of Maryland, upon its incorporation into the District of Columbia, the Constitution in its entirety became applicable to the District of Columbia. The Thirteenth Amendment, which abolished slavery and involuntary servitude, certainly did; that portion of the Fourteenth Amendment which related to citizenship, unquestionably did; as did the Fifteenth, Sixteenth and Nineteenth Amendments.

The suggestion that, because the prohibitions of Section 1 of the Fourteenth Amendment, against the abridgment of the privileges and immunities of citizens of the United States and against the deprivation of any person of life, liberty and property without due process of law and the denial to any person "within its jurisdiction" of the equal protection of the laws", begin with the words "No State" and "Nor shall any State", they do not apply to the District of Columbia, is a proposition that disregards the

manifest intention which gave rise to this Amendment and the historical conditions out of which it arose. From a constitutional standpoint, the District of Columbia at that time was regarded as on the same level with the State of Maryland, of which it had constituted a part.

To give so narrow an interpretation to the word "State" ignores not only the history of the District of Columbia, but also the fact that it was the very nucleus of the storm-centre out of which emerged the Fourteenth Amendment, that it was there that not only the Civil War had its most important setting, but where the pre-war and the post-war, scenes of the great drama which culminated in the adoption of the Thirteenth and Fourteenth Amendments were enacted. It is, therefore, as inconceivable that the District of Columbia is to be excluded from the operation of the Fourteenth Amendment as that it was intended to exclude it from the operation of the Eighteenth Amendment.

This Court had occasion in *Geofroy* v. *Riggs*, 133 U. S., 258, to consider the phrase "States of the Union" as contained in a clause of a treaty between the United States and France which related to the right of Frenchmen to enjoy the privilege of possessing personal and real property in "the States of the Union". There the question arose as to whether under this treaty, a citizen of France could take land in the District of Columbia by descent from a citizen of the United States. It was held that the District of Columbia, as a political community, was one of "the States of the Union" within the meaning of that term as used in the treaty, Mr. Justice Field saying in support of that conclusion:

> "This article is not happily drawn. It leaves in doubt what is meant by 'States of the Union'. Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia. And yet

separate communities, with an independent local government, are often described as states, though the extent of their political sovereignty be limited by relations to a more general government or to other countries. Halleck on Int. Law, c. 3, sections 5, 6, 7. The term is used in general jurisprudence and by writers on public law as denoting organized political societies with an established government. Within this definition the District of Columbia, under the government of the United States, is as much a State as any of those political communities which compose the United States. Were there no other territory under the government of the United States, it would not be questioned that the District of Columbia would be a State within the meaning of international law; and it is not perceived that it is any less a State within that meaning because other States and other territory are also under the same government. In *Hepburn* v. *Ellzey*, 2 Cranch, 445, 452, the question arose whether a resident and a citizen of the District of Columbia could sue a citizen of Virginia in the Circuit Court of the United States. The Court, by Chief Justice Marshall, in deciding the question, conceded that the District of Columbia was a distinct political society, and therefore a State according to the definition of writers on general law; but held that the act of Congress in providing for controversies between citizens of different States in the Circuit Courts, referred to that term as used in the Constitution, and therefore to one of the States composing the United States. A similar concession, that the District of Columbia, being a separate political community, is, in a certain sense, a State, is made by this Court in the recent case of *Metropolitan Railroad Co.* v. *District of Columbia*, 132 U. S., 1, 9, decided at the present term."

In *Talbot* v. *Silver Bow County*, 139 U. S., 444, Mr. Justice Brewer, referring to a statute of Montana Territory

which undertook to tax the shares of a national bank pursuant to Section 5219 of the Revised Statutes, which conferred the power of taxation upon the legislature of each State, no reference being made to Territories, said:

> "But it would militate much against its national character if banks organized under it (the national banking system) were subjected to local taxation in one part of the Union, and exempted from it elsewhere. No such intent ought lightly to be imputed to Congress. * * *
>
> Still further, while the word 'State' is often used in contradistinction to 'Territory', yet in its general public sense, and as sometimes used in the statutes and the proceedings of the government, it has the larger meaning of any separate political community, including therein the District of Columbia and the Territories, as well as those political communities known as States of the Union. Such a use of the word 'State' has been recognized in the decisions of this Court."

Then follow quotations from *Hepburn* v. *Ellzey, Metropolitan Railroad Co.* v. *District of Columbia* and *Geofroy* v. *Riggs, supra.*

At all events, there can be no question but that the due process clause of the Fifth Amendment applies to the District of Columbia, and, as has been shown, the same interpretation that has been given to the Fourteenth Amendment as to its applicability to the action of the judicial as well as of the executive and legislative departments of the Government, has been given to the Fifth Amendment.

The Right to Review the Rulings on Public Policy on this Appeal.

The appeal to this Court has been taken pursuant to Section 250 of the Judicial Code, for the purpose of presenting the constitutional questions thus far considered. That

procedure was pursued in *Smoot* v. *Heyl*, 227 U. S., 518, and in *Walker* v. *Gish*, 260 U. S., 447.

In the first of these cases it was also decided that the appeal brought the entire case here, thus enabling this Court to determine not merely the question of constitutionality, but all other questions involved in the record.

> *Horner* v. *United States, No. 2*, 143 U. S., 570;
> *Penn Mutual Life Ins. Co.* v. *Austin*, 168 U. S., 695.

This is in conformity with the procedure under Section 238 of the Judicial Code as laid down in numerous cases.

Pursuing the procedure thus authorized we will proceed to discuss other questions presented by the record and set forth in the assignments of error—

II.

The covenant the enforcement of which has been decreed by the Courts below is contrary to public policy.

(1) *The public policy of this country is to be ascertained from its Constitution, statutes and decisions, and the underlying spirit illustrated by them.*

The constitutional provisions considered under Point I unmistakably indicate that the segregation of colored people from white people and the statutory prohibition against the occupancy by colored persons of houses in restricted areas, are contrary to the genius of our institutions. An act which the legislature is prohibited from doing or authorizing must in its essence necessarily be opposed to public policy. So, likewise, whatever the legislative branch of the Government inhibits must be an offence against public policy.

As has been shown, Section 1978 of the Revised Statutes declares that all citizens of the United States shall have the same right in every State and Territory as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold and convey real and personal property. One would suppose that, if in the face of such a declaration a contract is entered into calculated to prevent the inheritance, purchase, lease, sale, holding and conveyance of real property by colored citizens of the United States in any State or Territory, such a contract is repugnant to our policy. It certainly was not intended that, if the white citizens of Washington agreed among themselves that they would not sell or lease any real property lying within the territorial limits of that city to a colored person, such an agreement would be enforceable as consonant with the controlling public policy.

And so when this Court has announced that legislation looking to the prevention of the acquisition of realty within a specified district by colored persons, is contrary to the Constitution and laws, it would seem to follow that a covenant between the white residents of that same district intended to prevent the acquisition of realty by colored persons, was contrary to our public policy.

In *Vidal* v. *Girard's Executors,* 2 How., 127, Mr. Justice Story pointed out that the policy of Pennsylvania on a particular subject was indicated by its Constitution and laws and judicial decisions. This view has been frequently adopted.

> *Hartford Fire Ins. Co.* v. *Chicago, M. & St. P. R. R. Co.,* 70 Fed. Rep., 201, 202;
> *Hollins* v. *Drew Theological Seminary,* 95 N. Y., 172;
> *Cross* v. *United States Trust Co.,* 131 N. Y., 344;
> *People* v. *Hawkins,* 157 N. Y., 12.

In *Messersmith* v. *American Fidelity Co.,* 232 N. Y., 161, 163, Judge Cardozo said:

"The public policy of this State (New York) when the legislature acts is what the legislature says that it shall be."

Where would one be more likely to arrive at the sources from which our public policy is derivable than by exploring the Constitution and statutes of the United States and the adjudications of this Court? A student of our history like DeTocqueville, Bryce or von Holst would at once be struck by the inconsistency of the principle laid down in *Buchanan* v. *Warley*, with that expressed in the opinions rendered in the present case by the Courts below.

It would appear to be obvious that, where a legislature is prohibited from sanctioning a particular policy, individuals may not enter into contracts in direct derogation of the same policy. Surely that which a legislature cannot sanction should not be compelled to be done by a decree of a court of equity enforcing specific performance of an agreement between third parties, which is the equivalent of such legislation and is productive of identical results.

If such a contract as that involved in the present case is valid as affecting a limited area, it would be equally effective if it included an entire city, a county, or a State. If the Constitution could be evaded as it is attempted to be by the device here employed, it would not be difficult to create a situation bearing the elements of a contract that would prevent a colored person from owning realty, or from taking up his habitation, in any State or in any part of a State.

(2) *The covenant is not only one which restricts the use and occupancy by negroes of the various premises covered by its terms, but it also prevents the sale, conveyance, lease or gift of any such premises by any of the owners or their heirs and assigns to negroes or to any person or persons of the negro race or blood perpetually, or at least*

for a period of twenty-one years. It is in its essential nature a contract in restraint of alienation and is, therefore, contrary to public policy.

In the present case it is to be observed that the parties to the instrument sought to be enforced in this action have covenanted that no part of the land therein described owned by them "shall *ever* be used or occupied by or sold, conveyed, leased, rented, or given to negroes or any person or persons of the negro race or blood" (*Rec.*, p. 7). It binds the parties, their respective heirs and assigns, for all time. It is true that in the succeeding sentence it is declared that the covenant "shall run with the land * * * for the period of twenty-one years from and after the date of these presents." That does not, however, cut down the covenant as between the parties so as to limit it to a period of twenty-one years. But whether the covenant be regarded as a perpetual covenant or as one running for twenty-one years only, it is equally opposed to public policy.

The subject of such restraints is learnedly discussed in *DePeyster* v. *Michael*, 6 N. Y., 497, by Chief Judge Ruggles. He points out that they were of feudal origin; creative of a violent and unnatural state of things, contrary to the nature and value of property and the inherent and universal love of independence; that they arose partly from favor to the heir and partly from favor to the lord, "and the genius of the feudal system was originally so strong in favor of restraints upon alienation, that by a general ordinance, mentioned in the Book of Fiefs, the hand of him who wrote a deed of alienation was directed to be struck off" (p. 498). To deal with this tyranny the statute of *Quia Emptores* was enacted in 18 Edward I, which provided "that from henceforth it shall be lawful for any freeman to sell, at his own pleasure, his lands and tenements, or part of them, so that the feoffee shall hold the same lands and tenements of the chief lord of the same fee, by such service and customs as the feoffee held before."

As Chief Judge Ruggles says (p. 500):

"The effect of this statute is obvious. By declaring that every freeman might sell his land, at his own pleasure, it removed the feudal restraint which prevented the tenant from selling his land, without the license of his grantor, who was his feudal lord. This was a restraint imposed by the feudal law, and was not created by express contract in the deed of conveyance; it was abolished by this clause in the statute. By changing the tenure from the immediate to the superior lord, it took away the reversion from the immediate lord; in other words, from the grantor, *and thus deprived him of the power of imposing the same restraint, by contract or condition expressed in the deed of conveyance.* The grantor's right to restrain alienation immediately ceased, when the statute put an end to the feudal relation between him and his grantee; and no instance of the exercise of that right, in England, since the statute was passed, has been shown, or can be found, except in the case of the king, whose tenure was not affected by the statute, and to whom, therefore, it did not apply.

The reason given by Lord Coke, why a condition that the grantee shall not alien, is void, is as follows: 'For it is absurd and repugnant to reason, that he that hath no possibility to have the land revert to him, should restrain his feoffee of all his power to alien. And so it is, if a man be possessed of a term for years, or of a horse, or any other chattel, real or personal, and give or sell his whole interest or property therein, upon condition that the donee or vendee shall not alienate the same, the condition is void, because his whole interest and property is out of him, so that he hath no possibility of reverter; and it is against trade and traffic, and bargaining between man and man.'"

In *Potter* v. *Couch*, 141 U. S., 296, 313, Mr. Justice Gray said:

> "But the right of alienation is an inherent and inseparable quality of an estate in fee simple. In a devise of land in fee simple, therefore, a condition against all alienation is void, because repugnant to the estate devised. Lit., Sec. 360; Co. Lit., 206b, 223a; 4 Kent Com., 131; *McDonogh* v. *Murdock*, 15 How., 367, 373, 412. For the same reason, a limitation over, in case the first devisee shall alien, is equally void, whether the estate be legal or equitable. *Howard* v. *Carusi*, 109 U. S., 725; *Ware* v. *Cann*, 10 B. & C., 433; *Shaw* v. *Ford*, 7 Ch. D., 669; *In re Dugdale*, 38 Ch. D., 176; *Corbett* v. *Corbett*, 13 P. D., 136; *Stcib* v. *Whitehead*, 111 Illinois, 247, 251; *Kelley* v. *Meins*, 135 Mass., 231, and cases there cited. And on principle, and according to the weight of authority [notwithstanding opposing dicta in *Cowell* v. *Springs Co.*, 100 U. S., 55, 57, and in other books], a restriction, whether by way of condition or of devise over, on any and all alienation, although for a limited time, of an estate in fee, is likewise void, as repugnant to the estate devised to the first taker, by depriving him during that time of the inherent power of alienation. *Roosevelt* v. *Thurman*, 1 Johns., Ch. 220; *Mandlebaum* v. *McDonell*, 29 Mich., 77; *Anderson* v. *Cary*, 36 Ohio St., 506; *Twitty* v. *Camp*, Phil. Eq. (No. Car.) 61; *In re Rosher*, 26 Ch. D., 801."

Especial attention is called to the exhaustive opinion in *Manierre* v. *Welling*, 32 R. I., 104, where many cases are cited and ably reviewed, and where one of the important conclusions reached in the case next to be cited was adopted:

> "We are entirely satisfied there has never been a time since the statute *quia emptores* when a restric-

tion in a conveyance of a vested estate in fee simple, in possession or remainder, against selling for a particular period of time, was valid by the common law. And we think it would be unwise and injurious to admit into the law the principle contended for by the defendant's counsel, that such restrictions should be held valid, if imposed only for a reasonable time. It is safe to say that every estate depending upon such a question would, by the very fact of such a question existing, lose a large share of its market value. Who can say whether the time is reasonable, until the question has been settled in the Court of last resort; and upon what standard of certainty can the Court decide it? Or, depending as it must upon all the peculiar facts and circumstances of each particular case, is the question to be submitted to a jury? The only safe rule of decision is to hold, as I understand the common law for ages to have been, that a condition or restriction which would suspend all power of alienation for a single day, is inconsistent with the estate granted, unreasonable and void."

Equally important is the classic opinion of Mr. Justice Christiancy in *Mandlebaum* v. *McDonell,* 29 Mich., 79, from which the foregoing excerpt is taken. That decision was approved not only by this Court in *Potter* v. *Couch,* 141 U. S., 315, 316, but also by the English Court of Chancery in *Re Rosher,* L. R. 26 Ch. Div., 801, an unusual compliment, especially since it resulted in the rejection of the decision of Sir George Jessel in *Re Macleay,* L. R. 20 Eq., 186.

The significance of this proposition is regarded as a justification for the citation of the following pertinent decisions.

In *Smith* v. *Clark,* 10 Md., 186, a devise of a woodlot to the testator's wife and daughters "on the express condition that the same is not at any time to be cleared or

converted into arable land," and a further condition that the land "shall be at all times held together by those who may be entitled to the same by virtue of the will," was held to be void.

In *McCullough's Heirs* v. *Gilmore,* 11 Pa. St., 370, the testator declared it to be his will and desire that a certain farm "fall into the possession of W, laying this injunction and prohibition not to leave the same to any but the legitimate heirs of W's father's family at his W's decease." This restraint on the power of alienation was held to be void.

In *Bennett* v. *Chapin,* 77 Mich., 527, it was held that when a restriction in a conveyance of a vested estate in fee simple, in possession or remainder, is against selling for a particular time, such restriction is invalid. Mr. Justice Long said:

> "Such restraints are not favored in the law. It is true that many restrictions or qualifications upon the rights of the devisee or grantee may be made effectual by making the estate itself dependent upon such condition; but where the estate granted is absolute, such restriction can impose no legal obligation upon the devisees, or limit their power over the estate, when the observance or violation of the restriction can neither promote nor prejudice any interest but their own. This rule was very fully discussed by this Court in *Mandlebaum* v. *McDonell,* 29 Mich., 87, and in support of this principle the Court cited *Hall* v. *Tufts,* 18 Pick., 459; *Bank* v. *Davis,* 21 Id., 42; *Brandon* v. *Robinson,* 18 Ves., 429; *Doebler's Appeal,* 64 Pa. St., 9; *Craig* v. *Wells,* 11 N. Y., 315.
>
> Aside from these reasons, however, we think the restrictions upon the sale cannot be upheld. No such restrictions are valid. When a restriction in a conveyance of a vested estate in fee simple, in possession or remainder, is against selling for a particular time,

such a restriction is invalid. When a person is entitled absolutely to property, any provision postponing its transfer or payment to him is void. Gray, in his rules against Perpetuities, thus states the rule:

'Suppose property is given to trustees in trust to pay the principal to A when he reaches thirty. When any other person than A is interested in the property, when, for instance, there is a gift over to B if A dies under thirty, the trustee will retain the property for the benefit of B; but when no one but A is interested in the property, when, should he die before thirty, his heirs or representatives would be entitled to it, when, in short, the direction for postponement has been made for A's supposed benefit, such direction is void, in pursuance of the general doctrine that it is against public policy to restrain a man in the use or disposition of the property in which no one but himself has any interest.'

The principle is generally held to be that all rights of property are alienable, and that a condition or restriction which would suspend all power of alienation for any length of time is inconsistent with the estate granted, and void."

In *Attwater* v. *Attwater,* 18 Beavan, 330, a devise of certain real estate to A "to become his property on attaining the age of twenty-five years, with the injunction never to sell it out of the family, but if sold at all it must be to one of his brothers hereinafter named," was held to be in restraint of alienation, and void.

In *Billing* v. *Welch,* Irish Rep., 6 Common Law, 88, a covenant by the grantee of land that he, his heirs and assigns would not alien, sell or assign to any one except his or their child or children without the license of the grantor, was declared void on the authority of the opinion of Lord Romilly in *Attwater* v. *Attwater, supra.*

In *Schermerhorn* v. *Negus,* 1 Denio, 148, a provision in

a devise to children that no part of the land should be aliened by any of the children or their descendants except to each other or their descendants, was held bad.

To the same effect are the decisions in *Johnson* v. *Preston,* 226 Ill., 447, 462, and *Pardue* v. *Givens,* 54 N. C., 306.

In *Anderson* v. *Carey,* 36 Ohio St., 506, the testator devised a farm to his two sons, Thomas and Lincoln, upon condition that they should not be allowed to sell and dispose of it until the expiration of ten years from the time his son Lincoln arrived at full age, except to one another, nor to mortgage or encumber it in any manner whatsoever except in the sale to one another. It was held that the restraint attempted to be imposed was void as repugnant to the devise and contrary to public policy. Mr. Justice McIlvaine said:

> "Instead of giving to his sons an estate in the land less than a fee simple the intent and purpose was to give them the fee simple but to eliminate therefrom this inherent element of alienability for a limited period or to incapacitate his devisees, although *sui juris,* from disposing of their property for the same limited period, to wit, until the younger should arrive at thirty-one years of age—each and both of which purposes was repugnant to the nature of the estate devised. By the policy of our laws it is of the very essence of an estate in fee simple absolute, that the owner, who is not under any personal disability imposed by law, may alien it or subject it to the payment of his debts at any and all times; and any attempt to evade or eliminate this element from the fee simple estate, either by deed or by will, must be declared void and of no force. * * * In holding that such restraint is repugnant to the nature of the estate devised and is void as against public policy, which, in this State, in the interests of trade and com-

merce, gives to every absolute owner of property who is sui juris the power to control and dispose of such property and subject the same to the payment of his debts, we are fully aware of the fact that many other authorities may and have been cited to the contrary."

In *Barnard* v. *Bailey, 2 Harrington* (Del.), 56, a condition in a devise that the devisee should not dispose of the property to the blood kin of either the testator or the devisee, was held to be bad.

In *Williams* v. *Jones,* 2 Swan (Tenn.), 620, there was a bequest to A on condition that she should not dispose of the property so as to allow either of four persons to get it. The condition was declared to be void.

In *Brothers* v. *McCurdy,* 36 Pa. St., 407, a testator directed that land devised to his son should not be sold to any person for the purpose of making brick or carrying on a brickmaking business, and more especially that he should not sell it to Lotz and Beasley, and declared that the devise of the lot was to be void in case of a sale contrary to his will, in which event the lot was to be held in common by the testator's other heirs. The gift over was adjudged to be void.

See also *Re Rosher,* L. R. 26 Ch. Div., 801, 816, and *Re Dugdale,* L. R. 38 Ch. Div., 176, 179, in both of which cases *In re Macleay,* L. R. 20 Eq., 186, was disapproved, as it likewise was in *Manierre* v. *Welling,* 32 R. S., 104.

In *Renaud* v. *Tourangeau,* L. R., 2 Privy Counsel App., 4, where a testator in Lower Canada devised real estate to her children, providing that they should in no way alienate the property until twenty years after his death, the Judicial Counsellor, per Lord Romilly, held that the restriction "was not valid either by the old law of France, or the general principle of jurisprudence."

In 4 Kent's Commentaries, 131, Chancellor Kent, discussing this general subject, said:

"Conditions are not sustained when they are re-

pugnant to the nature of the estate granted or infringe upon the essential enjoyment and independent rights of property and tend manifestly to public inconvenience. A condition annexed to a conveyance in fee or by devise that the purchaser and devisee should not alien, is unlawful and void. If the grant be upon condition that the grantee shall not permit waste or not take the profits, or his wife not have her dower or the husband his curtesy, the condition is repugnant and void, for those rights are inseparable from the estate in fee. Nor could a tenant in tail, though his estate was originally intended as a perpetuity, be restrained by any proviso in the deed creating the estate from suffering a common recovery. Such restraints were held by Lord Coke to be absurd and repugnant to reason and to "the freedom and liberty of freemen." The maxim which he cites contains a just and intelligent principle worthy of the spirit of the English law in the best ages of English freedom: *iniquum est ingenuis hominibus non esse liberam rerum suarum alienationem.* If, however, a restraint upon alienation be confined to an individual named to whom the grant is not to be made, it is said by very high authority to be a valid condition. But this case falls within the general principle and it may be very questionable whether such a condition would be good at this day. In *Newkirk* v. *Newkirk* (2 Caines, 345), the Court looked with a hostile eye upon all restraints upon the free exercise of the inherent right of alienation belonging to estates in fee; and a devise of lands to a testator's children in case they continued to inhabit the town of Hurley, otherwise not, was considered to be unreasonable and repugnant to the nature of the estate."

To the same effect are the following decisions:

Clark v. *Clark*, 99 Md., 356; 58 Atl. Rep., 24;

Winsor v. *Mills*, 157 Mass., 362; 32 N. E. Rep., 352;
Latimer v. *Waddell*, 119 N. C., 370; 26 S. E. Rep., 122;
Re Schilling, 102 Mich., 612;
Zillmer v. *Landguth*, 94 Wis., 607; 69 N. W. Rep., 568;
Jones v. *Port Huron Engine & Thresher Co.*, 171 Ill., 502; 49 N. E. Rep., 700.

That the natural operation of such a covenant as that under consideration is opposed to the public welfare, is illustrated by the allegations of the bill of complaint. It there appears (*Rec.*, pp. 4, 5) that after Mrs. Corrigan had entered into the contract to sell her residence to Mrs. Curtis, a number of the other parties to the covenant protested against her act. Whereupon Mrs. Corrigan wrote to these persons stating "in effect that her personal interests made it imperative that she dispose of said lands and premises at once." She offered, however, to sell the premises to them on the same terms as were provided in the contract of sale to Mrs. Curtis, provided they would indemnify her, but the plaintiff alleges "that such proposal last named has not been and will not be accepted by plaintiff, nor, so far as plaintiff is aware and believes, by any of the other parties to said indenture or covenant."

By reason of this covenant Mrs. Corrigan, therefore, however imperative her needs, is prevented from selling her property to a willing purchaser at a price which her co-covenantors are unwilling to pay. She is thus at their mercy, as are her creditors. The market value of her property is consequently seriously impaired, and as the years go on and surrounding conditions are likely to change, its marketability may become more and more lessened, and with it its assessable value, to the serious detriment of the public.

Porter v. Barrett Mich Dec 1925

(3) *Independently of our public policy as deduced from the Constitution, statutes and decisions, with respect to the segregation of colored persons and the fact that the covenant sued upon is in restraint of alienation, we contend that such a contract as that now under consideration militates against the public welfare.*

There can be no permissible distinction between citizens based on race, creed or color if we are to remain a free and harmonious nation. To have it appear in the judicial annals of our courts that one part of our citizenry may enter into contracts which are derogatory to another part, is intolerable, unless we are to abandon our most cherished traditions. If the different component elements constituting the body of American citizens can vote together and serve under the same flag, perform the same civic duties, pay the same taxes and cooperate in the development of our national resources, to say that a part of them shall not breathe the same air or live in the same neighborhood or pursue the same business as the other part, because they are colored, is to sow the seeds of discord and would tend to destroy that unity and harmony which should prevail in a free country.

The restrictive covenant in the present case relates to the ownership and occupation of property in a residential district. If such a covenant is valid, then what would prevent similar covenants with respect to districts devoted to commerce or manufacture? What would there be to prevent a similar covenant concerning the sale or holding of store property on Fifth Avenue or Broadway in the City of New York, on Pennsylvania Avenue in the City of Washington, on Chestnut Street in the City of Philadelphia, on State Street in the City of Chicago, to negroes or to any person or persons of the negro race or blood? What would prevent such a contract with regard to land devoted to mining or to agriculture, to forestation or to any other lawful human activity?

But why need this discussion be limited to a covenant

restricting the sale, conveyance, lease or gift of land to negroes or to any person or persons of the negro race or blood? Following the precedent created by the decisions rendered in the Court below, similar covenants have made their appearance in various parts of the country restrictive of sales and leases of land not only to negroes, but also to Jews. It will not take long before the prohibition will be extended to Catholics, and the entire Ku Klux Klan program of elimination might be made effective by means of restrictive covenants. By means of like covenants differences might be made between rich and poor, between members of different churches, between the adherents of different political parties, between the descendants of those of different origins, between native and naturalized citizens, between those who have come from the North and the South, the East and the West. It would lead to positive public misfortune and were our Courts to sanction such covenants it would give rise to untold evils.

It is also significant that the covenant forbids the use or occupancy by or the sale, conveyance, lease, rental or gift to "any person or persons of the negro race or blood." That would mean that a person who has flowing in his veins a single corpuscle of negro blood would come within the prohibition of the covenant. It would have included Alexander Dumas, and thousands of men and women, one of whose remote ancestors, not only of an antecedent third or fourth generation, but of the tenth generation back, might have been a negro. How is that damning taint to be ascertained? Who is to determine when negro blood changes its color? Are the courts to make the microscopic and biological tests which will determine whether an intending purchaser or occupant of premises coming within the scope of this covenant is to be precluded from the ownership or occupancy of so sanctified a piece of land?

Let us now consider the decisions bearing on the aspect

of the covenant coming within this subdivision of our argument.

We have already referred to *Gondolfo* v. *Hartman*, 49 Fed. Rep., 181, as discountenancing such covenants.

A similar case is *Title Guarantee & Trust Co.* v. *Garrott*, 42 Cal. App., 150, 152, where the Court refused to enforce a condition in a deed providing for forfeiture in case of the sale or lease of property to any person of African, Chinese or Japanese descent.

At page 157 the Court said:

> "The rule that conditions restraining alienation, when repugnant to the estate conveyed, are void, is founded on the postulate that the conveyance of a fee is a conveyance of the whole estate, that the right of alienation is an inherent and inseparable quality of an estate in fee simple, and that, therefore, a condition against alienation is repugnant to and inconsistent with, the estate conveyed. To transfer a fee and at the same time restrain the free alienation of it is to say that a party can grant and not grant, in the same breath. But the rule is not founded exclusively on this principle of natural law. *It rests also on grounds of clear public policy and convenience in facilitating the exchange of property, in simplifying its ownership and in freeing it from embarrassments which are injurious not only to the possessor, but to the public at large.*"

At page 160:

> "If the continuation of the estate in the grantee may be made to depend upon his not selling or leasing to persons of African, Chinese, or Japanese descent, it may be made to depend upon his not selling or leasing to persons of Caucasian descent, or to any but Albinos from the heart of Africa, or blond Eski-

> mos. It is impossible on any known principle to say that a condition not to sell to any of a very large class of persons, such as those embraced within the category of descendants from African, Chinese, or Japanese ancestors, shall not be deemed an unreasonable restraint upon alienation, but that the proscribed class may be so enlarged that finally the restriction becomes unreasonable and void. Where shall the dividing line be placed? What omniscience shall tell us when the restraint passes from reasonableness to unreasonableness? Who can know whether he has title to land until the question of reasonableness has been passed upon by the court of last resort? No matter how large or how partial and infinitesimal the restraint may be; the principles of natural right, *the reasons of public policy*, and that principle of the common law which forbids restraints upon the disposition of one's own property, are as effectually overthrown by the one as by the other."

A petition to have the case heard in the California Supreme Court was unanimously denied September 8, 1919.

In the opinion subsequently rendered in *Los Angeles Investment Co.* v. *Gary*, 181 Cal., 680, which will be presently discussed, the Court referred in terms of praise and approval to the opinion of Judge Finlayson in *Title Guarantee & Trust Co.* v. *Garrott*, adding:

> "The decision in that case was presented to us for consideration by a petition for rehearing, and the petition was denied because of our conclusion that the decision was correct, a conclusion from which we see no reason for departing."

Consequently the Supreme Court of California likewise decided that a condition or covenant that property conveyed "shall not be sold, leased or rented to one not of

the Caucasian race until after January 1, 1930," was void at common law as against public policy, irrespective of the fact that the restraint on alienation was but partial and was limited to persons of a particular class or to a comparatively brief period.

In *State* v. *Darnell*, 166 N. C., 300, 302, 303, 81 S. E. Rep., 338, an ordinance was adopted by the Board of Aldermen of Winston, N. C., pursuant to a provision of the city charter authorizing them to pass any ordinance which they deemed proper for the good order and general welfare of the city if it does not contravene the laws and Constitution of the State, which made it unlawful for any colored person to occupy as a residence any house upon any street on which a greater number of houses are occupied by white people than are occupied by colored people, and containing a similar provision as to whites. This ordinance was declared void in an interesting opinion by Chief Justice Clark, who pointed out that such legislation was similar in its character and tendency to that which years ago prescribed in Ireland limits beyond which the native Irish or Celtic population could not reside, thus creating what was called the "Irish Pale," and similar more recent legislation in Czaristic Russia, where the Jews were restricted in the right of residence in a limited territory known as the so-called Jewish Pale of Settlement. In each instance the consequences were tragic and resulted in infinite harm, and constituted powerful incentives to disorder and revolution. The following passage in his opinion calls attention to the underlying vice of the ordinance then under consideration, in terms which we regard as equally applicable to the covenant involved in the present case:

> "We do not think that the authority conferred by Section 44 of the Charter to enact ordinances for the 'general welfare of the city' can justly be construed as intended by the Legislature to authorize an ordi-

nance of this kind which establishes a public policy which has hitherto been unknown in the legislation of our State. To do so would give the words 'general welfare' an extended and wholly unrestricted scope which we do not think the Legislature could have contemplated in using those words. If the Board of Aldermen is thereby authorized to make this restriction a bare majority of the board could, if they may 'deem it wise and proper,' require Republicans to live on certain streets, and Democrats on others, or that Protestants shall reside only in certain parts of the town, and Catholics in another, or that Germans or people of German descent should reside only where they were in the majority, and that Irish and those of Irish descent should dwell only in certain localities, designated for them by the arbitrary judgment and permission of a majority of the aldermen. They could apply the restriction as well to business occupations as to residences, and could prescribe the localities allotted to each class of people without reference to whether the majority already therein is of the proscribed race, nationality, or political or religious faith.

"Besides, an ordinance of this kind forbids the owner of property to sell or to lease it to whomsoever he sees fit, as well as forbids those who may be desirous of buying or renting property from doing so where they can make the best bargain. Yet this right of disposing of property, the *jus disponendi*, has always been held one of the inalienable rights incident to the ownership of property which no statute will be construed as having power to take away."

It has been frequently laid down that even a restriction as to the manner of using land, in order to be valid, must not be contrary to public policy.

Whitney v. *Union Railway Co.*, 11 Gray, 359;

DeGray v. *Monmouth Beach Club House Co.*, 50 N. J. Eq., 329, 24 Atl. Rep., 388;
Brewer v. *Marshall*, 19 N. J. Eq., 537.

The Covenant is Not Ancillary to the Main Purpose of a Valid Contract and therefore is an Unlawful Restraint.

Thus far we have treated the covenant the enforcement of which the Courts below have decreed, in its general aspects. *It now becomes important to call attention to an outstanding fact, namely, that at the time when the covenant was entered into, the various parties who executed it, severally owned the twenty-four parcels of lands described therein and on which at the time there had been erected separate dwelling houses. None of them at the time of its execution and in connection therewith acquired from any of the others title to the lands which they respectively owned. None of them had entered into a contract with the others to which the covenant was an incident or ancillary.* We have, therefore, an agreement between twenty-four adjoining landowners whereby they agreed among themselves not to sell, convey, lease, rent or give the premises owned by them respectively to negroes or to any person or persons of the negro race or blood.

While it may be claimed that this covenant was not one relating to trade or commerce, in the strict sense of the term, nevertheless, in these later days, the tendency of the law has been to encourage the transferability of real estate with the same facility as has long existed in the case of personalty. The public policy of today favors the ready transfer of realty from one person to another. In *Manierre* v. *Willing*, 32 R. I., 104: 78 Alt. Rep., 519, Mr. Justice Parkhurst, quoting the opinion of Mr. Justice Christiancy in *Mandlebaum* v. *McDonell*, 29 Mich., 79, expressed the prevailing policy when he said:

> "and certainly, in a country like ours, where lands are as much an article of sale and traffic as personal property, and the policy of the State has been to encourage both the acquisition and easy and free alienation of lands, such restrictions ought not be encouraged by the Courts."

The same idea was expressed by Mr. Justice Garber in *Test Oil Co.* v. *LaTourrette,* 19 Okla., 214, 91 Pac. Rep., 1025, 1028:

> "In this country land is one of the chief objects of trade and investment—'mud and civilization go together'. As the latter advances the transfer of the former becomes more frequent. Just in the degree that the temporary owner of a tract of land is permitted to impress his notions or caprices upon the fee restricting its future alienation, just in that degree does it hamper the terms and facility of its exchange in trade and destroy that continuance which has given it the reputation of being the subject of safe and sound investment. Hence restrictions upon the alienation of the fee in land are repugnant to trade and commerce, and are looked upon with disfavor by the law."

Moreover, as has been shown under the preceding subdivision of this argument, long before the rule of public policy which forbade restraint of trade in merchandise or the like, came into being, contracts in restraint of the alienation of realty had been treated as opposed to public policy. Hence it is our contention that the covenant now under consideration, which, as an independent agreement between the parties thereto, limits the sale of land or its occupancy to a certain class of human beings and excludes other of God's children from the right to occupy or purchase it, in the aspect of public policy comes at least within the rules applicable to the restraint of trade in personalty.

In *United States* v. *Addyston Pipe Co.*, 85 Fed. Rep., 271, affd. 175 U. S., 211, Mr. Chief Justice Taft, then writing for the Circuit Court of Appeals for the Sixth Circuit, classified the decisions in which covenants in *partial* restraint of trade had been upheld. They involved agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere by competition or otherwise with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant or agent not to compete with his master or employer after the expiration of his time of service.

Referring to this classification, it was added (p. 281):

> "Before such agreements are upheld, however, the Court must find that the restraints attempted thereby are reasonably necessary (1, 2 and 3) to the enjoyment by the *buyer* of the property, good-will or interest in the partnership *bought;* or (4) to the legitimate needs of the existing partnership; or (5) to the prevention of possible injury to the business of the *seller* from the use by the *buyer* of the thing *sold;* or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employee of the confidential knowledge acquired in such business. * * * It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced *unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the cove-*

nantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party. In *Horner* v. *Graves*, 7 Bing., 735, Chief Justice Tindal, who seems to be regarded as the highest English judicial authority on this branch of the law (see Lord Macnaghten's judgment in *Nordenfeldt* v. *Maxim Nordenfeldt Co.* (1894) App. Cas. 535, 567) used the following language:

'We do not see how a better test can be applied to the question whether this is or is not a reasonable restraint of trade than *by considering the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public.* Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is, in the eye of the law, unreasonable. *Whatever is injurious to the interests of the public is void on the ground of public policy.*'

This very statement of the rule implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one one of the parties from the injury which, in the execution of the contract or the enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contracts suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined."

See also 13 *Corpus Juris*, title "*Contract*," Section 420, page 477, and cases cited.

In the present case there is an utter absence of those elements which in the case cited were deemed to justify covenants in partial restraint of trade.

That this principle is applicable to restrictive covenants affecting real estate appears from the decisions collated in 3 Williston on Contracts, Sec. 1642.

This doctrine does not owe its existence to the Sherman Act, or any other similar legislation. It is a principle enforced by the courts both at common law and in equity, long prior to such legislation.

As applicable to this discussion, we take the liberty of quoting extensively from the opinion of Mr. Justice Hughes in *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S., 373. The question there involved was as to whether a manufacturer, in connection with the sale of his product, may affix conditions as to the use of the article sold or as to the prices at which purchasers may dispose of it. There the condition was ancillary to a sale. Yet it was held, for reasons about to be pointed out, that such conditions were contrary to public policy, and, therefore, void. Mr. Justice Hughes said:

> "But because a manufacturer is not bound to make or sell, it does not follow that in case of sales actually made he may impose upon purchasers every sort of restriction. Thus a general restraint upon alienation is ordinarily invalid. 'The right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand. General restraint in the alienation of articles, things, chattels, except when a very special kind of property is involved, such as a slave or an heirloom, have been generally held void. 'If a man,' says Lord Coke, in Coke on Littleton, section 360, 'be possessed of a horse or any other chattel, real or personal, and give his whole interest or property therein, upon condition that the donee or vendee shall not alien the same, the same is void, because his whole interest or property is out of

him, so as he hath no possibility of reverter; and it is against trades and traffic and bargaining and contracting between man and man.' *Park* v. *Hartman*, 153 Fed. Rep., 24. See also Gray on Restraints, on Alienation, Sections 27, 28."

At page 406 the opinion continues:

"With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy. * * * 'The true view at the present time', said Lord Macnaghten in *Nordenfeldt* v. *Maxim Nordenfeldt & Co.*, 1904, A. C., page 565, 'I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. *All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule.* But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public.'

The present case is not analogous to that of a sale of good will, or of an interest in a business, or of the grant of a right to use a process of manufacture. The complainant has not parted with any interest in its business or instrumentalities of production. It has conferred no right by virtue of which purchasers of its products may compete with it. It retains complete control over the business in which it is engaged, manufacturing what it pleases and fixing such prices for its own sales as it may desire. Nor are we dealing with a single transaction, conceivably unrelated to the public interest. The agreements are designed to maintain prices, after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them."

Let us apply the principle of this decision to the case now under consideration. Here the various covenantors merely combined among themselves to restrain one another and their respective heirs and assigns either permanently or for a period of twenty-one years, from selling property belonging to them respectively, in the ownership of which they continued, to negroes or any person or persons of the negro race or blood. They thereby limited the number of possible purchasers. The effect would be either unduly to depress or unduly to increase the price at which the property might be sold. At all events it tended to restrict competition. The covenant happened to exclude from the list of possible purchasers or occupants negroes or persons of the negro race or blood. That excluded upwards of ten million citizens of the United States, or ten per cent. of the entire population. If Catholics and Jews had been added to the number of those blacklisted, it would have limited the possible purchasers to the extent of upwards of twenty million more of our citizens, or an additional twenty per cent. of the population.

If a covenant like that under consideration, entered into

by white persons, is valid, then a corresponding covenant by colored land-owners restricting the sale of their property so as to exclude all white persons or those of the Caucasian race or blood as possible purchasers, would be equally permissible. That would affect at least 100,000,000 of our population. Is that not a *reductio ad absurdum* of the contention that covenants of this character are not opposed to public policy?

If the various dealers in woolen cloth or shoes or prepared articles of food carrying on business in Washington had covenanted with each other not to sell or to give any of their products to these several classes of human beings coming within the ban of their displeasure, it is believed that our courts would not long hesitate to declare such a covenant as contrary to public policy. How does the illustration differ in principle from the covenant now under discussion? The fact that in the one case the covenant relates to the acquisition of a habitation and in the other of articles of clothing or of food, does not constitute a valid ground for differentiation. As was said by Mr. Justice Holmes in *Block* v. *Hirsh*, 256 U. S., 156, "housing is a necessary of life." It is as much a necessity for those of the negro race or blood as it is for those of the white race.

If covenants of this character are valid in relation to the property on one city block, they would be equally applicable to a hundred, or, if there were so many, a thousand city blocks in the City of Washington, and since, as was said in the opinion in the case just cited, "the space in Washington is necessarily monopolized in comparatively few hands", the cumulative effect of such covenants would be to drive out of the City of Washington, and for that matter out of the District of Columbia, all or most of the persons of the negro race or blood whose business or occupation or interest it is to pursue their respective vocations in that City or District as it is a matter of public interest that they should pursue their vocations there. Such a scheme is not an unheard of conception. It was attempted

in *In re Lee Sing*, 43 Fed. Rep., 359. According to the census of 1920 the white popualtion of the District numbered 326,860 and the negro population 109,966, or nearly a quarter of the entire population. It is also interesting to note parenthetically that the covenant would practically preclude the white owner of any one of the houses affected by it, to permit domestic servants of the negro race or blood to live upon his premises.

It surely cannot be said that our courts are more tender in their consideration for those affected by trade and commerce in personal property than they are for the welfare of those human beings who desire to establish homes and to acquire the ownership or the right of occupancy of a place which they may call their own.

Mrs. Curtis is certainly entitled to as much freedom from restraint upon her right to acquire a habitation where she and her family may lay their heads, as were the vendees of the patent medicine of Dr. Miles Medical Company to be free from the restrictions as to price imposed by the vendor of that panacea. She should not for a moment be lost sight of in this controversy. Her liberty to acquire property is as much involved as is the liberty of Mrs. Corrigan to sell hers. The right of both of them to contract with respect to the premises here in question is to be determined, that is, the right of disposition by the one, and the right of acquisition by the other.

In the aspect of the case now under discussion, namely, that of a covenant containing a restraint on the right of alienation or of use or occupation which is not incidental to and in support of another contract, or a sale of property or of a business, it is a subject of serious consideration as to whether such a covenant entered into, as in this case, by twenty-four different individuals, would not constitute a common law conspiracy. The decision in *Callan* v. *Wilson*, 127 U. S., 540, 555, 556, would so indicate.

That case was cited in *Granada Lumber Co.* v. *Mississippi*, 217 U. S., 440, 441, where Mr. Justice Lurton said:

"But when the plaintiffs-in-error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of conspiracy, and may be prohibited or punished if the result be hurtful to the public or to the individual against whom the concerted action is directed" (*Cellan* v. *Wilson,* 127 U. S., 555, 556).

To the same effect is *Eastern States Lumber Assn.* v. *United States,* 234 U. S., 600, 614.

While it is true that in the first of these cases, the question directly involved related to the constitutionality of a statute of Mississippi, and that the second was an action brought under the Sherman Anti-Trust Act, it is nevertheless believed that the principle invoked was one which related to a common law conspiracy.

(4) *We are not unmindful of the cases relied upon in the court below to sustain the enforcement of this covenant. We contend that these decisions are not only unsound but also distinguishable.*

They are:

Los Angeles Investment Co. v. *Gary,* 181 Cal., 680;
Queensboro Land Co. v. *Cazeaux,* 136 La., 724;
Koehler v. *Rowland,* 275 Mo., 573;
Parmalee v. *Morris,* 218 Mich., 625.

(*a*) So far as they undertake to sustain the validity of such a covenant as that now under discussion, we contend that the conclusions reached are erroneous, since they disregard the legitimate scope and effect of the decision in *Buchanan* v. *Warley* and of Sections 1977 and 1978 of the Revised Statutes and the mischief that is inherent in such

a covenant. They fail to differentiate between restrictions in deeds which prohibit the use of property for certain purposes, such as that considered in *Cowell* v. *Springs Co.*, 100 U. S., 57, and a covenant which constitutes a segregation of negroes from other citizens. They likewise overlook the distinction between such a case as the present and cases like *Plessy* v. *Ferguson*, 163 U. S., 537, and the *Berea College Case*, 211 U. S., 45, which was fully pointed out in *Buchanan* v. *Warley* and in *Carey* v. *City of Atlanta*, 143 Ga., 192.

(*b*) In *Los Angeles Investment Co.* v. *Gary*, *supra*, the Court as has already been pointed out, approved of the decision in *Title Guarantee & Trust Co.* v. *Garrott*, *supra*, in so far as to hold that a condition or covenant in partial restraint on alienation, whether limited to a particular class of persons or to a comparatively brief period, was void because contrary to public policy. The Court, however, held that so much of the covenant which it then had under consideration as provided "nor shall any person or persons other than of Caucasian race be permitted to occupy said lot or lots," was not a restraint upon alienation, but upon the use of the property, and was, therefore, valid.

The decision was by a divided court which consisted of five members, two of whom, Mr. Chief Justice Angellotti and Mr. Justice Lennon, having dissented. It likewise appears from the opinion of Mr. Justice Olney, that the Court had "not been favored by either brief or argument on behalf of the respondents," that is, the parties against whom the condition was sought to be enforced. Moreover, the question of public policy in its broad aspects was not discussed.

The prevailing opinion further contains the striking qualification:

> "In connection with this decision it may be well to add that what we have said applies only to re-

straints upon use imposed by way of condition, *and not to those sought to be imposed by covenant merely.* The distinction between conditions and covenants is a decided one and the principles applicable quite different."

Furthermore, it would seem that, if a restriction upon alienation is opposed to public policy, a covenant which would seek to prevent the use and occupancy of property by its owner would be equally contrary to public policy. It would tend to produce the same evils as those which brought about the rule with respect to restraints on alienation. The right to use and occupy property is an essential incident of ownership. It was so recognized in *Buckanan* v. *Warley* (see p. 7, supra). Of what avail would be the right to acquire the title of property, if the grantee may not take it into his possession and enjoy its use? If Mrs. Curtis could not be debarred from becoming the owner of the fee of the premises which Mrs. Corrigan was ready to convey to her, was her right of ownership to be limited to the leasing of the property to white tenants? The distinction sought to be drawn leads to a palpable absurdity.

(c) In *Queensborough Land Co.* v. *Cazeaux, supra,* and *Kohler* v. *Rowland, supra,* the Court had under consideration conditions in deeds which provided for forfeiture were the premises conveyed to be sold or leased by the grantee to a negro. In both cases it was held that the conditions did not constitute unlawful restraints upon the power of alienation.

Commenting on these decisions in his opinion in *Title Guarantee & Trust Co.* v. *Garrott,* Mr. Justice Finlayson said:

"With neither of them do we agree. The Louisiana case was decided in accordance with the principles of the civil law, and can throw but little, if any, light upon the construction of our Code provision, based, as it is, on the common law of England—a body of law that, ever since the statute *quia emptores,* has

more and more treated land *as an article of sale and traffic,* as much so as personal property. In the Missouri case the Court in one brief paragraph disposes of this difficult question out of hand, citing but one case, *Cowell* v. *Colorado Springs Co.,* 100 U. S., 55, to sustain its statement that, 'it is entirely within the right and power of the grantor to impose a condition or restraint upon the power of alienation in certain cases to certain persons, or for a certain time, or for certain purposes.' In short, the Missouri court's decicision is based upon a dictum of Mr. Justice Field—a dictum by one of the country's most learned jurists, it is true, but a dictum nevertheless which, so far as it refers to a time limitation upon alienation, is contrary to all the well-reasoned cases, such as *Mandlebaum* v. *McDonell, supra,* and in so far as it refers to restraints that are partial as to persons or classes of persons, is, we believe, contrary to logic and contrary to the clear implication of the Supreme Court of this State in *Murray* v. *Green,* 64 Cal., 367, 368, that any restraint whatever upon the power of alienation, however partial or temporary, or of whatever character, is violative of Section 711 of our Civil Code, and, furthermore, it is dictum that is pregnant with uncertainties that necessarily would produce the greatest inconvenience in the world of trade and commerce, for no one could say whether any particular restriction was reasonable until the question had been litigated to the court of last resort, and no judge could know what standard of certainty should be employed to determine the question."

Further referring to *Cowell* v. *Colorado Springs Co.,* Mr. Justice Finlayson pointed out:

"What that learned jurist (Mr. Justice Field) said about restraint upon alienation was dictum pure and

simple and not in accord with the weight of authority nor the better reasoned cases. That that part of the excerpt from the opinion of Mr. Justice Field wherein he animadverts upon restraints upon alienation, is dictum, the Federal Supreme Court itself has declared in the subsequent case of *Potter* v. *Couch,* 141 U. S., 315."

In this connection it is likewise proper to refer to the comments of Professor Gray upon *Cowell* v. *Springs Co.,* and other similar cases, in Sections 40, 52-54 of the second edition of his scholarly work on "Restraints on the Alienation of Property."

(*d*) *Parmalee* v. *Morris, supra,* like *Los Angeles Investment Co.* v. *Gary, Kohler* v. *Rowland* and *Queensborough Land Co.* v. *Cazeaux,* was a case arising on a condition contained in a deed which conveyed property which was the subject of the restriction. In neither of these cases was there a covenant between independent owners of land each of whom had acquired a title free from condition or restriction of the character sought to be created. Moreover, *Parmalee* v. *Morris* was decided on the authority of the other three cases, and, therefore, depends upon the soundness of the reasoning of those cases, which, we contend, does not subserve the public welfare.

The opinion of Mr. Justice Moore in *Parmalee* v. *Morris* seems to proceed on a misunderstanding of a legitimate argument presented in opposition to the validity of such a condition. The fallacy of the conclusion reached becomes evident from these excerpts from the opinion:

"Suppose the situation was reversed and some negro who had a tract of land platted it and stated in the recorded plat that no lot should be occupied by a Caucasian, and that the deeds that were afterwards executed contained a like restriction; would any one think that dire results to the white race would follow an enforcement of the restriction?"

We answer that such a restriction would be as vicious as that of which we are now complaining. If the negroes possessed the wealth of the Caucasians and could acquire property just as the Caucasians are now enabled to acquire it, would it not lead to unfortunate consequences if such a condition were aimed at a Caucasian by a negro?

Let us continue the argument to its legitimate consequences, and suppose that it was a Catholic who had conveyed lands with the condition that it should not be occupied by a Protestant, or vice versa, or if one of German, Irish, French or Italian descent had conveyed property on the condition that it was not to be occupied by an Englishman or a Scotchman or by one who was a native of New England, or California, or Iowa, or Tennessee. Would it not be said at once that such a restriction boded mischief to the public good?

The opinion continues:

> "The issue involved in the instant case is a simple one, i. e., shall the law applicable to restrictions as to occupancy contained in deeds to real estate be enforced, or shall one be absolved from the provisions of the law simply because he is a negro?"

Our answer is that the provision is void, not "simply" because the person against whom it is sought to be enforced is a negro, but because it is contrary to the genius of our American institutions, to the spirit of the Constitution, and to the peace, quiet, good order, unity, harmony and dignity of the people of the United States.

The attack is made on this covenant because it is opposed to the fundamental principles on which our Government rests, that all men are created equal and that they are entitled to the protection of their lives, their liberty, and their property. It is believed that our courts will not, by their decrees, effectuate a purpose which destroys our cherished traditions and which would recognize

and tend to create a system of caste. The moment that there is a differentiation in our courts between white and black, Catholic and Protestant, Jew and non-Jew, hatreds and passions will inevitably be aroused, and that which has been most noble and exalted and humane in American life will have been shattered. Great as are the mental and spiritual sufferings of those against whom the shafts of prejudice and intolerance are aimed, the lasting injury is, however, inflicted upon the civilization of a country which connives at a covenant such as that which has been enforced by the decrees here sought to be reviewed. Mrs. Curtis may well say to the covenantors, in the words of the unknown Negro poet celebrated by Thomas Wentworth Higginson:

> "I go to de jedgment in de evenin' of de day
> When I lay my body down,
> An' my soul an' your soul will meet in de day
> When I lay dis body down."

(5) *Here the appellee has resorted to a court of equity to enforce a covenant which, so far as Mrs. Curtis is concerned, who was a stranger to the covenant, is oppressive and unreasonable and lacking in equity.*

She was not a party to the agreement. She is a victim of its prohibitions. It is an impairment of her right to acquire real property as conferred by Section 1978 of the Revised Statutes, and, consequently, it is believed that a court of equity should not make itself a party to effectuate the scheme whereby it is sought to deprive her of the rights secured to her by the Constitution and the statutes of the United States and its public policy.

> 4 Pomeroy's Equity Jurisprudence, 3d ed., Secs. 1404, 1405;
> *Cathcart* v. *Robinson*, 5 Peters, 263;
> *Pope Mfg. Co.* v. *Gormully*, 144 U. S., 236, 237;
> *Curran* v. *Holyoke Water Co.*, 116 Mass., 90.

III.

It is respectfully submitted that the decrees appealed from should be reversed and the motion to dismiss the bill of complaint granted.

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CONTENTS.

CASES CITED AND DISCUSSED.

OTHER AUTHORITIES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 104.

IRENE HAND CORRIGAN AND HELEN CURTIS, *Appellants*,

against

JOHN J. BUCKLEY, *Appellee*.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The statement of the case, of the questions involved, and of the manner in which they are raised, as set out in the brief of the appellants, being conceived by the appellee to be inadequate and not sufficiently full and complete to present the issues, the following statement is submitted.

This is an appeal from a decree of the Court of Appeals of the District of Columbia (Rec., p. 25) affirming a final decree of the Supreme Court of the District of Columbia (Rec., p. 18) whereby the appellant Corrigan was "permanently enjoined for and during the period of 21 years from and after the 1st day of June, 1921", from selling or conveying to the appellant Curtis a certain parcel of land

in the City of Washington, known as Lot 20, Square 152, improved by dwelling house 1727 "S" Street, N. W.; and permanently enjoining the appellant Curtis during the same period of time "from taking title directly or indirectly from the defendant Corrigan to the hereinabove described land and premises and from using or occupying the same and from selling, conveying, leasing, renting, or giving the same to, or permitting the same to be used or occupied by, any negro or negroes, or persons of the negro race or blood" (Rec., pp. 18-19).

The Bill of Complaint.

November 16, 1922, the appellee filed in the court below his bill of complaint for injunction to prevent the appellant Corrigan from conveying to the appellant Curtis, and to prevent the latter from taking title to or occupying, certain real estate in the city of Washington, in violation of a covenant, and thereby to compel specific performance of the negative covenant (Rec., pp. 1-6).

The bill alleged that the appellee is the owner of an undivided interest in lot 74, square 152, improved by dwelling house 1719 S Street, Northwest, Washington, D. C.; and that the appellant Corrigan is the owner of lot 20, square 152, improved by dwelling house 1727 S Street, Northwest. That on June 1, 1921, the appellee, as one of the owners of the first described premises, and the appellant Corrigan, as the owner of the second described premises, together with twenty-eight other persons who were the owners, severally, of twenty-three other parcels of land improved by dwelling houses adjacent and contiguous to and in the same immediate neighborhood of the two parcels above described, all improved by dwelling houses, being in squares 152 and 153 and situated on the north and south sides of S Street between New Hampshire Avenue and Eighteenth Street, Northwest, mutually executed, acknowledged and delivered a covenant, and duly recorded the same in the office of the

Recorder of Deeds of the District of Columbia on August 20, 1921; that all the persons who executed the covenant are white persons, a large number of whom resided and made their homes, and continue to reside and make their homes in said premises, respectively (Rec., pp. 1-3).

THE COVENANT IN ISSUE.

The indenture or covenant is attached to and made a part of the bill and is as follows (Rec., p. 6):

> "This indenture made this first day of June, A. D. 1921, by and between the undersigned, all being residents of the City of Washington, District of Columbia, and owners of real estate situate therein, witnesseth that:
>
> "Whereas the said parties hereto are all owners of real estate situate in the District of Columbia, and located on S Street, between New Hampshire Avenue and 18th Street, Northwest, both on the north side and south side of said street, said property being parts of Squares 152 and 153 as recorded in the Surveyor's Office of the District of Columbia, and
>
> "Whereas the said parties hereto desire, for their mutual benefit, as well as for the best interests of the said community and neighborhood, to improve and in any legitimate way further the interests of said community.
>
> "Now therefore, in consideration of the premises and the sum of Five Dollars ($5.00) each to the other in hand paid, the parties hereto do hereby mutually covenant, promise and agree each with the other and for their respective heirs and assigns, that no part of the land now owned by the parties hereto, a more detailed description of said property being given after the respective signatures hereto, shall ever be used or occupied by, or sold, conveyed, leased, rented, or given, to Negroes or any person or persons of the Negro race or blood. This covenant shall run with the land and bind the respective heirs and assigns of the parties hereto for the period of twenty-one (21) years from and after the date of these presents."

The appellee further alleged that on September 26, 1922, the appellant Corrigan entered into a sales contract with the appellant Curtis to sell to the latter the lot and house then and theretofore belonging to the former and included within the covenant. That appellant Curtis is a person of negro race and blood and at and before the making of the contract of sale had knowledge of the existence and terms of the covenant; and that in executing the contract of sale, appellant Corrigan had promised to perform acts in violation of the terms and conditions of the covenant (Rec., pp. 3-4).

The appellee further alleged that at first the appellant Corrigan stated that she had been tricked and defrauded into signing the sales contract, having been made to believe that the appellant Curtis was not a negress but a white person, and that appellant Corrigan had demanded cancellation of the contract of sale on the ground of fraud and misrepresentation; that the appellant Curtis had tendered to the appellant Corrigan the purchase price provided in the contract of sale which appellant Corrigan had refused to accept; but that subsequently appellant Corrigan had threatened to carry out the contract of sale unless other property owners, parties to the covenant, would buy her property and indemnify her against loss (Rec., pp. 4-5).

Finally the appellee averred that if the threats are carried out and the appellant Corrigan conveys her property to appellant Curtis, irreparable injury will be done to the appellee and to the other persons who are parties to the aforesaid Indenture or Covenant; that appellee has no plain, adequate and complete remedy at law; and that he is entitled to specific performance on the part of the appellant Corrigan of her said agreements and covenants and to have the terms and provisions of said Indenture or Covenant specifically enforced in equity by means of an injunction preventing both the appellants from carrying into effect the contract of sale (Rec., p. 5).

Relief Prayed.

The appellee prayed that the appellant Corrigan be permanently enjoined for twenty-one years from the date of the covenant from carrying out the contract of sale with the appellant Curtis and that the appellant Curtis be permanently enjoined during the same period of time from taking title to said land and from occupying same and from selling, conveying, leasing, renting or giving the same to or permitting the same to be used or occupied by any negro (Rec., pp. 5-6).

The contract of sale attached to and made part of the bill appears at page 9 of the record and is in the form of the usual contract of sale except that in addition to the words "the title is to be good of record" are added the words "except as to covenants of record, if any".

December 7, 1922, the appellant Curtis filed a motion to dismiss the bill on the ground that it attempts to deprive her and others of property without due process of law, abridges the privileges and immunities of citizens of the United States including herself, and is forbidden by the Fifth, Thirteenth and Fourteenth Amendments to the Constitution, and the laws enacted in aid thereof (Rec., p. 11).

The motion of the appellant Curtis did not contain the objection that the covenant is void because contrary to public policy; but at the hearing in the trial Court the question of public policy was orally raised, argued and passed upon.

The trial Court in its opinion filed April 12, 1923 (Rec., pp. 11-16) ruled against the appellant Curtis on both grounds, holding that the covenant is not in violation of the Constitution and is not against public policy; and on April 16, 1923, the motion to dismiss was overruled (Rec., p. 16).

April 25, 1923, the appellant Corrigan filed her motion to dismiss on the two grounds that the covenant is void as being in violation of the Constitution and as being contrary to public policy (Rec., p. 16), and on April 27, 1923, the motion of the appellant Corrigan was overruled (Rec., p. 17).

May 4, 1923, both the appellants elected to stand on their motions to dismiss (Rec., pp. 17-18); and on May 8, 1923, a final decree was passed enjoining both appellants, as prayed in the bill, for the period of twenty-one years from the date of the covenant as hereinbefore set out (Rec., p. 18).

From this decree the appellants prosecuted an appeal to the Court of Appeals of the District of Columbia, which, on June 2, 1924, affirmed the decree of the trial Court (Opinion, Rec., pp. 22-25, Decree, Rec., p. 25).

From this decree the appellants have prosecuted this appeal.

QUESTIONS INVOLVED.

The Court of Appeals in its opinion (Rec., p. 23) has clearly and succinctly stated what questions are and what questions are not involved in this case, in the following language:

> "Appellant seems to have misconceived the real question here involved. We are not dealing with the validity of a statute, or municipal law, or ordinance; nor are we concerned with the right of a negro to acquire, own, and use property; nor are we confronted with any pre-existing rights which are affected by the covenant here in question. The sole issue is the power of a number of land owners to execute and record a covenant running with the land by which they bind themselves, their heirs and assigns, during a period of twenty-one years, to prevent any of the land described in the covenant from being sold, leased to, or occupied by, negroes."

The questions raised by the appellants, and decided in the negative by both the Courts below, are:

1. Is the covenant void as being a violation of the Fifth, Thirteenth and Fourteenth Amendments to the Constitution in that it deprives the appellant Curtis of property without due process of law or in that it abridges the priv-

ileges and immunities of the appellant Curtis as a citizen of the United States?

2. Is the covenant void as being contrary to public policy?

3. A third contention, not raised in the trial court, but argued in the appellants' brief, is that the covenant is void because it is in restraint of alienation; and this question, as well as the first two, will be discussed in this brief.

ARGUMENT.

The appellants by their motions to dismiss (general demurrers) admit all the facts well pleaded in the bill of complaint, and the only function of the courts is to apply to these facts the correct legal principles.

The opinions of the Courts below, consisting as they do of a correct analysis and application of all the authorities in point, need no argument to sustain them; and this portion of appellee's brief will be devoted almost entirely to a consideration of the statements and arguments of the appellants and of the authorities cited by them.

No Constitutional Question Involved.

As shown above, the question of constitutionality attempted to be raised in both the Courts below is not concerned with a law or ordinance of a State or sub-division thereof, but concerns a contract, in the form of a mutual covenant running with the land, entered into by private persons, not affecting any pre-existing or vested rights of any persons other than the parties to the covenant.

It will be observed that the appellants have entirely abandoned, in this Court, their attacks upon the covenant itself; and now shift to the ground that the two Courts below have violated the Constitution.

The first point in appellants' brief (p. 6) is:

> **"The decrees of the Courts below constitute a violation of the Fifth and Fourteenth Amendments to the Constitution, in that they deprive the appellants of their liberty and property without due process of law."**

This point is attempted to be maintained on the basis of the proposition that the Courts below, while not legislative bodies of a State, yet are "instrumentalities of the State", and that by their decrees have violated the provisions of Section 1 of the Fourteenth Amendment, which provides that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

and have also violated the provisions of the Fifth Amendment that:

> "No person * * * shall be deprived of life, liberty, or property, without due process of law."

Passing, for the moment, the fact that the District of Columbia is not a State and that the decrees of the Courts below were based upon the fundamental principles of the law of private property, the first question arising is: How and in what manner is either of the appellants deprived of her liberty or property without due process of law? What liberty? What property? What failure of due process of law?

Long before the appellant Corrigan entered into the contract of sale with, and threatened to convey to, the appellant Curtis the land in question, she, as owner of said land, had entered into a mutual contract or covenant with numerous neighboring land owners, duly recorded according to law, whereby she voluntarily curtailed her liberty of action in respect of her property in said land by covenanting that it should not be sold to or occupied by a negro; and the appellant Curtis, having of course a general right to acquire

property, entered into the contract for the purchase of this particular land with full knowledge that its acquisition by her would be in violation of the pre-existing rights of all the other persons parties to the covenant.

The decrees of the Courts below are simply a judicial enforcement of the rights of the appellee which the appellants attempted to invade.

As was recently well said in an able review of the decisions in cases involving the questions herein discussed:

> "True, that a decision becomes a law, but it in no wise violates the Fourteenth Amendment since the court merely gives effect to the contract of the individual. It is, in such a case, discrimination by the individual and not by the courts. If the restriction is not too broad and is otherwise unobjectionable except that it discriminates and the courts refuse to enforce it, is that not a violation of that part of the Fourteenth Amendment which declares 'nor shall any State deprive any person of life, liberty or property, without due process of law'? This provision guarantees to all citizens freedom of contract. The only limitation of this freedom to contract being that it not be in contravention of public policy."

Alfred S. Stolinski, "The Legal Effect of a Contract or Covenant in relation to Real Property which Discriminates against Persons because of Race or Color." 8 Bi-Monthly Law Review, Universitly of Detroit, Nov.-Dec. 1924.

A careful examination of all the cases cited by appellants in support of this contention shows that there is not a single case or authority supporting it.

Furthermore, if the contention of the appellants is sound that the decrees of the Courts below constitute violations of the Fifth and Fourteenth Amendments to the Constitution because those Courts are "instrumentalities of the State", it necessarily follows that the States of California, Louisiana, Michigan, Maryland, Missouri and Virginia have,

through their highest Courts, in cases hereinafter cited, committed violations of the Constitution. Yet even the appellants abstain from carrying their argument to this logical conclusion; and apparently it has never occurred to any lawyer in any of the cases decided by the Courts of those States, upholding the contentions of the appellee in this case, to raise such question and attempt to have any of the decisions in those States reviewed by this Court.

We therefore necessarily revert to the two questions attempted to be raised below, namely, is the covenant void as being in violation of the Constitution, or is it contrary to public policy?

Covenant Not In Violation of Constitution

The principal fallacy in the arguments of the appellants is that by virtue of the provisions of the Constitution a negro has the right to acquire, own and occupy property; therefore he has ~~to~~ the right to acquire, own and occupy any particular property he may desire; therefore the refusal of the owner of a particular piece of property to sell the same to him because he is a negro violates his Constitutional rights as a citizen.

I have a right to refuse to sell or lease my property to a negro or any other individual and it can be purchased against my will only by the sovereign. I have the right to restrict its use or occupancy by deed or covenant binding upon my privies in estate. My neighbors have the same right. My neighbors and I have the right, for the mutual benefit of ourselves and our heirs and assigns and of the land itself, to agree and covenant to the same effect.

The only limitations are that we shall not so use our property as to infringe the rights of others; that the restrictions shall not violate the rule against perpetuities or be in total restraint of alienation and that the agreement shall not be contrary to public policy, that is to say, shall not be injurious to the public welfare.

As the Court of Appeals has aptly said in its opinion (Rec., p. 23):

> "The constitutional right of a negro to acquire, own, and occupy property does not carry with it the constitutional power to compel sale and conveyance to him of any particular private property. The individual citizen, whether he be black or white, may refuse to sell or lease his property to any particular individual or class of individuals."

This Court has held several State laws and municipal ordinances involving denial to negroes of the right to acquire and occupy property in certain sections to be within the prohibition of the Constitutional amendments. It is to be observed that in practically all such cases questions of pre-existing vested property rights were also involved. But this Court, as well as the courts of last resort in the States, have repeatedly distinguished clearly between State, County and Municipal laws and ordinances, and the private actions or contracts of individuals.

See:

Slaughter House Cases, 16 Wall., 36, 67, 88.
U. S. v. Cruikshank, 92 U. S., 542.
In Re Virginia, 100 U. S., 313.
Virginia v. Rives, 100 U. S., 313.
U. S. v. Harris, 106 U. S., 629.
Civil Rights Cases, 109 U. S., 3.
Plessy v. Ferguson, 163 U. S., 537.

It is also definitely established that the Civil Rights statutes are unconstitutional or beyond the power of Congress when applied to the acts of individuals.

U. S. v. Cruikshank, 92 U. S., 542.
U. S. v. Harris, 106 U. S., 629.
Civil Rights Cases, 109 U. S., 3.
Hodges v. U. S., 203 U. S., 1.

It is also definitely established that the Fourteenth Amendment to the Constitution is not applicable to the District of Columbia.

See:

D. of C. v. Brooke, 214 U. S., 138.
Siddons v. Edmonston, 42 App. D. C., 459.

That covenants against ownership or occupancy by negroes are neither unconstitutional nor contrary to public policy is held in the following cases, some of which will be discussed later:

Parmalee, et al. v. Morris, 218 Mich. 624 188 N. W. 330.
Queensborough Land Co. v. Cazeaux, 136 La. 724.
Los Angeles Investment Co. v. Gary, 181 Cal. 680.
Janss Investment Co. v. Walden, et al., Calif. Sup. Ct., p. 34, Advance Sheets Pac. Rep., Vol. 239, No. 1, October 19, 1925.
Koehler v. Rowland, 275 Mo. 573.
Keltner v. Harris (Mo.) 196 S. W. 1.
State v. Gurry, 121 Md. 534.
Pleasants v. Wilson, 125 Md., 237.
Burns et al. v. Williams et al., Circuit Ct. No. 2 of Baltimore City, Md., 72 Baltimore Daily Record, 411, Mar. 1, 1924.
Neighborhood Corporation v. Blum, Circuit Ct. No. 2 of Baltimore City, Md., 72 Baltimore Daily Record, 1131, Dec. 11, 1924.
Peoples' Pleasure Park v. Rohleder, 109 Va. 439.
Hopkins v. Richmond, 117 Va. 693.
There is no case in point *contra*.

The case of Gandolfo v. Hartman, 49 Fed. 181, cited and relied upon by appellants, is not in point.

This was a case decided in 1892 by District Judge Ross in the United States District Court for the Southern District of California.

The suit was for an injunction to prevent the violation of a covenant never to convey or lease land to a Chinaman. The head note is as follows:

> "A covenant in a deed not to convey or lease land to a Chinaman is void, as contrary to the public policy of the government, in contravention of its treaty with China, and in violation of the fourteenth amendment of the constitution, and is not enforcible in equity."

So far as the question of public policy is concerned, the case is opposed to the decisions of the highest court of California.

So far as the decision is based on treaty rights it is not in point.

So far as the question of constitutionality is concerned, the decision is based solely on a complete misconception of the opinion of Mr. Justice Field, on circuit, in the case of Ah Kow v. Nunan, 5 Sawyer, 552.

The latter case involved not the action of individuals but the validity of a municipal ordinance of San Francisco, known as the "Queue Ordinance", and was a suit for damages for maltreatment in the cutting off of the plaintiff's queue.

The ordinance was held to be invalid on several grounds, among others the following, as succintly stated in the fifth headnote:

> "The ordinance being directed against Chinese only, and imposing upon them a degrading and cruel punishment, is also subject to the further objection, that it is hostile and discriminating legislation against a class forbidden by that clause of the fourteenth amendment to the constitution, which declares that no State 'shall deny to any person within its jurisdiction the equal protection of the laws'. This inhibition upon the State applies to all the instrumentalities and agencies employed in the administration of its government; to its executive, legislative and judicial departments, and to the subordinate legislative bodies of its counties and cities."

The case in re: Lee Sing, 43 Fed. 359, cited on page 54 of the appellants' brief is not in point, it involving the validity of a municipal ordinance.

In the case of Parmalee et al. v. Morris, 218 Mich., 624 (June, 1922) the validity was in issue of the following restriction:

> "No building shall be built within 20 feet of the front line of the lot. Said lot shall not be occupied by a colored person, nor for the purpose of doing a liquor business thereon."

All lots were sold subject to the foregoing restriction. Morris, a negro, entered into a contract to purchase one of the lots. The owners of other lots in the subdivision and residents of the same neighborhood filed a bill to restrain defendant from occupying the premises. Motion to dismiss the bill was overruled.

The sole question was: Whether or not the restriction was void as controvening the provisions of the 13th and 14th Amendments to the Constitution.

Moore, J., delivering the opinion of the Supreme Court of Michigan, stated that the opinion of the trial court was so clear that it is reproduced.

Opinion by the trial chancellor, p. 626:

> "Every owner of land in fee is invested with full right, power and authority, when he conveys a portion away to impose such restrictions and limitations in its use as will in his judgment prevent the grantee, or those claiming under him, from making such use of the premises conveyed as will impair the use or diminish the value of the part which he retains. The only limitation on this right is the requirement that the restriction be reasonable; not contrary to public policy and not create an unlawful restraint on alienation. These rights have been repeatedly recognized by our Supreme Court, and in a recent case the following quotation from 7 R. C. L. 114, is cited with approval:
>
> 'A person owning a body of land, and selling a portion thereof may, for the benefit of his remaining land impose upon the land granted any restrictions

> not against public policy, that he sees fit, and a court of equity will generally inforce them. Davidson v. Taylor, 196 Mich. 605, 611.

"1 Since the days of the Civil Rights cases, the law has been regarded as settled that the 13th and 14th Amendments applied to legislative acts of the State rather than the actions of individuals." (Quoting from Civil Rights Cases, *supra,* and referring to United States vs. Cruikshank, *supra.*)

P. 632: "The issue involved in the instant case is a simple one, *i. e.,* shall the law applicable to restrictions as to occupancy contained in deeds to real estate be enforced or shall one be absolved from the provisions of the law simply because he is a negro? The question involved is a purely legal one and we think it was rightly solved by the Chancellor under the decisions found in his opinion."

It is apropos at this point to call attention to the language of Mr. Justice Bradley in the Civil Rights cases, 109 U. S. 3, quoted by Mr. Justice Brown delivering the opinion of the court in Plessy v. Ferguson, 163 U. S. 537-543:

> "It would be running the slavery argument into the ground, to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater or deal with in other matters of intercourse or business."

In Queensborough Land Co. vs. Cazeaux, *et al.*, 136 La., 724, decided in 1915, the two questions of constitutionality and public policy were decided in respect of a restriction against sale or lease to negroes. The case was heard by the Supreme Court of Louisiana on certification by the Court of Appeal, Second Circuit, for the determination by the Supreme Court of questions arising upon appeal by defendants from a judgment of the District Court for the Parish of Caddo in plaintiff's favor in an action brought to enforce a

covenant in a deed of real estate forbidding the sale of the property to negroes, and recover possession of the property for breach thereof.

Facts: Lots in a subdivision were sold subject to a covenant that vendees, their heirs and assigns should for 25 years refrain from selling or leasing lots to negroes. One lot sold to Cazeaux who sold to his co-defendant, a negro.

Case certified with request that the following questions, among others, be answered:

1. Does the stipulation in the deed with reference to the transfer of the property to a negro violate the 14th Amendment of the Constitution of the United States?

2. Is said provision contrary to the public policy of this State, and therefore null and void?

The Court decided the two questions adversely to the defendants, saying, through Provosty, J.:

> "The first, because the general government has not undertaken to interfere with private rights within the States in the interest of the negro race. The 14th Amendment, in as far as prohibiting discrimination against the negro race, applies only to state legislation, not to contracts of individuals. Civil Rights Cases, 109 U. S. 62. The matter is one purely of state, or local, interest, with which the general government has no concern and upon which therefore it can have no policy. Ex parte Plessy, 45 La. Am., 80.
>
> "To the second question we answer that, while the public policy of the State opposes putting property out of commerce, it at the same time favors the fullest liberty of contract."

The case of Title Guaranty & Trust Co. vs. Garrott, 42 Calif. App., 152, cited by appellants, involved the validity of a covenant providing for absolute forfeiture to the grantor in case of alienation to persons of certain races and was decided by reference to the provisions of the California statute forbidding restraint of alienation. The Court of Appeals in this case said, at page 161:

> "There is a clear distinction between a restriction on *use* of the premises by the grantee in a deed conveying the fee, imposed by a condition or covenant whereby reasonable building restrictions are created and a direct restraint on alienation. It is true a restriction upon use may narrow the circle of possible purchasers. * * * Certain it is that a restriction upon use only is not within the letter or spirit of section 711 of the Civil Code, or of the Common Law doctrine of which that section is a codification."

This case was decided in July, 1919, and the Supreme Court of California denied a hearing in that Court.

Subsequently, December, 1919, the Supreme Court decided the case of Los Angeles Investment Company vs. Gary, 181 Calif., 680, in which, referring to the case of Title Guaranty & Trust Co. vs. Garrott, it is said, page 682:

> "The decision in that case July 10, 1919, was presented to us for consideration by a petition for rehearing, and the petition was denied because of our conclusion that the decision was correct, a conclusion from which we see no reason for departing. The demurrer was, therefore, properly sustained as to the alleged cause of action based on the fact that the lot in question had been sold to the defendant Gary.
>
> "The condition, however, that the property should not be occupied by a person not of Caucasion birth is in a different category. It is not a restraint upon alienation, but upon the use of the property."

Los Angeles Investment Co. vs. Gary, *supra,* was an action to declare forfeiture of title to property for breach of a covenant which provided that the property should not be sold, leased or rented to or occupied by any person not of the Caucasian race, for breach of which the property should revert to the grantors, their successors, devisees or assigns.

The Court held that the condition prohibiting the sale was clearly a restraint on alienation, that the deed likewise purports to convey a fee, and an incident of an estate in fee

is the right of free disposal or transfer, and that this restraint was repugnant under the Code of California.

> "The condition, however, that the property should not be occupied by a person not of Caucasian birth, is in a different category. It is not a restraint upon the alienation, but upon the use of the property. * * *
>
> "The particular condition in this case being one against the occupation of the property by persons not of the Caucasian race, the question suggests itself as to whether it is an unlawful discrimination against certain classes of citizens, and therefore within the prohibition of the Federal Constitution. This question, however, it settled conclusively against the defendants by repeated decisions of the United States Supreme Court; the provision of the Federal Constitution material is the 14th Amendment. It provides: 1. No state shall * * * deny to any person within its jurisdiction the equal protection of the law.
>
> "Construing this amendment, the Supreme Court of the United States has held in a number of instances that the inhibition applies exclusively to action by the State and has no reference to action by individuals, such as is involved here (citing U. S. v. Cruikshank, 92 U. S. 542; Va. v. Rives, 100 U. S., 313; U. S. v. Harris, 106 U. S. 629; Civil Rights Cases, 109 U. S. 3, and many other cases).
>
> "Our conclusion is that the condition against the occupation of the property by any one not of the Caucasian race is valid, and that, since a breach of this condition is alleged, the complaint states a cause of action."

The latest case in point which has come to the attention of counsel is the case of Janss Investment Co. vs. Walden et al., decided by the Supreme Court of California, sitting in bank, August 26, 1925, rehearing denied Sept. 24, 1925, and reported at p. 34. Advance sheets, Pacific Reporter, Vol. 239, No. 1, October 19, 1925.

The headnote is as follows:

> "A provision in an installment contract for sale of a lot, that the property should not be used or occupied

by any person who was not of the Caucasian race *held* valid, it being a restraint on use of property and not on alienation."

The facts in the case were that the Janss Investment Co. sold, from a subdivision, a lot to Walden, under an installment contract containing the following paragraph:

> "No part of said real property shall ever be leased, rented, sold or conveyed to any person who is not of the white or Caucasian race, nor be used by any person who is not of the white or Caucasian race, whether grantee hereunder or any other person."

The contract also provided that it should not be transferable without the written consent of the grantor upon payment of a fee of $1.00.

The day after the contract was entered into, Walden, a white man, attempted by quit-claim deed, to convey to the defendants Walling, who are negroes. The Court says:

> "The sole question presented for determination by this court is as to the validity of that part of the condition of the contract between the parties thereto that 'No part of said real property shall ever * * * be used or occupied by any person who is not of the white or the Caucasian race * * *'
>
> "If the question were a new one to this court it would demand careful investigation of the legal principles and the authorities presented by appellant in support of his contention touching the constitutionality of the condition set forth in the contract, to which reference has been had. In view, however, of the fact that the identical question has been raised recently in a preceding case and passed upon by this tribunal adversely to appellant's contention in the case at bar, it becomes unnecessary and inadvisable to devote much time or thought to a consideration of the legal points suggested by appellant. We refer to the case of *Los Angeles Investment Co. v. Gary*, 181 Cal. 680. The facts therein as stated in the opinion of the court, were that the plaintiff was the owner of a tract of land which had been subdivided into town lots; that it sold one of such

lots to a man named Renaker, who in turn sold it to defendant Gary, who was a negro, and who, with his wife, who was a colored woman, thereafter went into the use and occupation of the property. The deed by which the property was conveyed by the plaintiff therein to Renaker contained a condition '* * * that the said property shall not be sold, leased or rented to any persons other than of the Caucasian race, nor shall any person or persons other than of Caucasian race be permitted to occupy said lot or lots.' The deed there, as the contract here, also contained the usual forfeiture and reversionary clauses for breach of any of its conditions. It will thus be seen that the facts in the two cases are practically identical one with the other.

"The matter seems to have been thoroughly considered both by the court sitting in department and, later, on petition for rehearing, by the court sitting in bank. The conclusion reached, as fairly stated in the syllabus, was that 'The provision in a deed that no person or persons other than of the Caucasian race shall be permitted to occupy the property, is not a restraint upon alienation, but upon the use of the property, and is valid.' "

This case seems to dispose of the appellants' criticisms of the two last cited California cases.

The case of Keltner vs. Harris, 196 S. W., 1, (Missouri), was a suit to set aside a deed, the relief sought being granted. The facts were that the plaintiff, a white man, owned a house and had entered into a contract to purchase adjoining property, which is in controversy, and subsequently entered into contract to sell the same to a white man. He conveyed to this man, who on the same day conveyed to a colored man. Evidence was that defendant knew plaintiff and other neighbors objected to the sale because of the purchaser's color, and that the agent obtained deed through false representations.

The Court stated, p. 2: "In other words, no man is bound to sell his property to a proposed purchaser, whose presence is unsatisfactory to him as a neighbor, whether he be white, black or of some other color."

Since the decisions in State vs. Gurry, 121 Md., 534, and Pleasants vs. Wilson, 125 Md., 237 (both of which will be fully discussed herein under the head of Public Policy), the two following cases have been decided in the Circuit Court for Baltimore City, Maryland, namely: Burns, *et al.*, vs. Williams, *et al., supra;* and Neighborhood Corporation vs. Blum, *supra.* In the first case the Court decided as follaws:

> Dawkins, J.:
>
> "The Court is of the opinion that the agreement between the plaintiff and the defendant and other parties mentioned in said agreement, which is referred to and copy of which is filed with the bill of complaint and made part thereof, whereby all said parties covenant each with the other that they and each of them, their and each of their heirs, personal representatives, successors and assigns shall and will have, hold, stand seized and possessed of the said respective properties mentioned in said agreement as owned by them subject to the restriction, limitation and condition that neither the said respective properties nor any of them nor any part of them or any of them shall be at any time occupied or used by any negro or negroes or person or persons either in whole or in part of African descent, except only that negroes or persons of negro or African descent either in whole or in part may be employed as servants by any of the owners of said properties and containing other stipulations is not void as being in conflict with any provisions of the Constitution of the United States or the amendments thereof or as being against public policy or any rule of law, all persons owning property having a perfect right by voluntary agreement among themselves to subject it to such limitations and restrictions and such agreements when duly recorded in the proper land records of Baltimore City, constituting notice to all subsequent purchasers of said property of the terms and conditions thereof."

Because, however, of a further provision in the agreement that it should not be enforceable in equity unless executed in respect of all the property in the area mentioned

in the agreement, and it appearing that it had not been executed in respect of all such property, the Court dissolved the preliminary injunction and dismissed the bill.

In the second case the same Court, in granting a permanent injunction against the breach of similar covenant, said:

> Dawkins, J.:
>
> "I indicated at the close of this case that I felt inclined to follow the ruling I made in a similar case about six months ago. People who sign these agreement have a perfect right to do it and thereby bind themselves, their heirs, representatives and those following them in title.
>
> "It is my judgment that it is not only not against public policy, but it is in line with public policy that people who own property should have this power and the right to impose upon said property the restriction as to the kind of people who shall own the same.
>
> "The case to which I have referred gives my views as to such agreements. I now hold the same view as then expressed as to the right of property owners to bind themselves not to sell or rent their property to persons of any special kind or class."

Neither of the cases went to the Court of Appeals of Maryland.

In the case of Spilling vs. Hutcheson, 111 Va., 179 (discussed hereinafter under Remedy), a suit of mandatory injunction to compel performance of a covenant concerning land, the Court quoted with approval the language of Lord Cairns in Doherty vs. Allman, 3 H. L. App. Cas. 729, as follows:

> "If parties, for a valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say by way of injunction that which the parties have already said by way of covenant, that the thing shall not be done, and in such case the injunction does nothing more than to give the sanction of the process of the court to that which already is the contract between the parties."

A careful examination of all the cases cited by the appellants in support of their contentions under their first point, that is to say, upon the constitutonality *vel non* of the covenant in question, and the constitutionality *vel non* of the actions of the lower Courts in passing and affirming the decree appealed from, shows none to be in point.

The principal case relied upon by appellants, the case of Buchanan vs. Warley, 245 U. S. 60, repeatedly cited and quoted from by them, is not in point; the question involved in that case being the constitutionality of a municipal ordinance of Louisville, Kentucky, requiring segregation of the races in residential districts and forbidding the transfer of property, etc.

At page 81 of the opinion Mr. Justice Day, speaking for this Court, put in very concise form the very heart of the case—the sole question at issue in the case—when he said:

> "The case presented does not deal with an attempt to prohibit the amalgamation of the races. The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color, and of a colored person to make such disposition to a white person."

We have no such situation in the case at bar. Here, we have no law ordinance or decree of a court attempting to annul the right of either a white man or a negro to dispose of his property as he may see fit. What we have, first, is the case of more than a score of neighboring white persons and home owners mutually surrendering, for valuable considerations, by a covenant duly executed, acknowledged and recorded in the land records, their right to convey their respective contiguous properties to negroes, or to permit negroes to occupy the same; and, second, a decree of a court of competent jurisdiction forbidding a threatened and attempted violation of the contractual rights of the other parties to the covenant.

In their brief at page 15 the appellants argue:

> "To test the incongruity of such a situation, let us suppose that after the decision in Buchanan v. Warley, the Common Council of the City of Louisville had adopted an ordinance permitting the residents of the same districts which were affected by the ordinance which this Court had declared unconstitutional, to enter into a covenant in the precise terms of that which the Courts below have enforced in this case, would it not at once have been said that it was an intolerable invasion of the Constitution as interpreted by this Court. But that is exactly what has been done in the present case by the adjudications which are now here for review."

The answer to this is that no action of the Common Council of Louisville is necessary to permit citizens to enter into such a covenant affecting their own property; that if such a covenant should be entered into by either white or negro residents of certain sections of that city such action would put the question in a totally different category—one in which the parties to such covenant would be voluntarily surrendering or restricting their own pre-existing rights.

On page 16 of their brief the appellants suggest another supposititious case, that is to say, after the decision in Buchanan vs. Warley, "would this court have countenanced an amendment of the decree which it had reversed providing that ninety per cent of the residents of the district in which segregation had been attempted might enter into a covenant in precisely the same terms as the ordinance and that, thereupon, such covenant should be in full force and effect?"

The obvious answer to this question is its own adsurdity.

The constitutionality of laws segregating the white race from the negro and other colored races in public conveyances, in schools and otherwise, the miscegenation laws, and the separation in many of the walks of life by general and uniform habit and custom of the several races themselves, will be discussed under the head of Public Policy.

THE COVENANT IS NOT CONTRARY TO PUBLIC POLICY.

In the case of Hollis vs. Drew Theological Seminary, *et al.*, 95 New York 166 (cited by the appellants on page 28 of their brief as "*Hollins* vs. Drew Theological Seminary), the court, at page 172, defines public policy as follows:

> "In a juridical sense, public policy does not mean simply sound policy, or good policy, but as defined by Daniel Webster in the Girard Will case (2 How. 127), it means the policy of a State established for the public weal, 'either by law, by courts, or general consent.' "

As stated in Kintz v. Harriger, 99 Ohio State, 240, cited by appellants in their brief in the Court of Appeals, public policy:

> "May be generally said to be the *community common sense and common conscience* extended and applied throughout the State to matters of public morals, public health, public safety, public welfare and the like. It is that *general and well-settled public opinion* relating to man's plain, palpable duty to his fellow-man, that has due regard to all circumstances of each particular situation."

The appellee accepts the definitions of public policy tendered by appellants.

In the case of Hartford Fire Ins. Co. vs. Chicago, M. & St. P. R. R. Co., 175 U. S. 91, also cited by appellants, Mr. Justice Gray, speaking for this court, said at page 100:

> "Questions of public policy as affecting the liability for acts done, or upon contracts made and to be performed, within one of the states of the Union—when not controlled by the Constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application—are governed by the law of the State as expressed in its own Constitution and statutes, or declared by its highest court."

In the same case this Court quoted with approval, at page 102, the following statement from 26 Iowa 202:

> "The power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt."

Both the Courts below have decided that the covenant is not contrary to public policy.

The Court of Appeals of the District of Columbia is not the highest court of a State of the Union in the strict sense, but it is the highest court of a territorial sub-division of the United States with a population greater than several of the States. Its jurisdiction is broader than any of the State or inferior Federal courts, embracing, as it does, all matters and questions of law and equity which, in the States, are divided between the State and the Federal Courts.

The Congress has made its judgments final and not reviewable by this Court by appeal or writ of error, but only by certification or certiorari. (Judicial Code and Amendatory Act of February 13, 1925.)

Its decision of the local question of public policy would therefore seem, under the case of Hartford Fire Ins. Co. vs. Chicago M. & St. P. R. R. Co., *supra,* to be conclusive.

This Court will take judicial notice, as did both Courts below, not only of legislation by the Congress for the District of Columbia, but also of the existence of facts and conditions, of habits and customs, of "community common sense and common conscience" and of "general and well-settled public opinion" which are matters of common knowledge. As stated in 23 C. J., §. 1810, p. 50:

> "The Courts will take notice of whatever is, or ought to be, generally known within the limits of their jurisdiction; and they ought not to assume ignorance of, or exclude from their knowledge, matters which are known to all persons of intelligence."

The Supreme Court of the District of Columbia said in its opinion, record page 15:

> "In Wall vs. Oyster, 36 App. D. C. 50, the statute providing for separate schools for white and colored children in the District of Columbia was upheld.
>
> "As pointed out by the plaintiff's counsel the municipal authorities of the District have provided for separate bathing beaches, tennis courts, golf course and play ground."

After discussing the rule concerning segregation of the races as announced in the case of Plessy vs. Ferguson, 163 U. S. 537, the Court of appeals said in its opinion, record, page 24:

> "The foregoing rule applies not only to segregation in railway coaches but to statutes requiring separate white and colored schools, as well as regulations providing for the segregation of the races in municipal play grounds, municipal golf courses, municipal tennis courts, and municipal bathing beaches. The same general and settled public opinion controls in respect of the segregation of the races in churches, hotels, restaurants, lodging houses, apartment houses, theaters, and places of public amusement.
>
> "It follows that the segregation of the races, whether by statute or private agreement, where the method adopted does not amount to the denial of fundamental constitutional rights, can not be held to be against public policy. Nor can the social equality of the races be attained either by legislation or by the forcible assertion of assumed rights."

It is clear from the cases already cited that the covenant in this case is not only not in violation of the Constitution, but is not invalid as being contrary to public policy.

The case of *State* vs. *Gurry*, 121 Maryland, 534, involved the validity of a Municipal ordinance of Baltimore City providing for the segregation of white and colored people in different residential districts. The Court of Appeals

of Maryland held the ordinance invalid because it affected prior vested rights.

The elaborate discussion of the ordinance from the standpoint of public policy is, however, important especially as it is by the highest court of the State of Maryland, of which the District of Columbia was formerly a part, and from which it has taken the great bulk of its laws, customs, habits and mode of life.

The court discusses this subject as follows:

> P. 541. "Both State and Federal Courts have been most industrious in dealing with the many cases growing out of the laws claimed to have been passed in the exercise of this power, known as the police power, and it might be well to consider what is meant, in a constitutional sense, by that term. As was said by that learned jurist, CHIEF JUSTICE SHAW, in Commonwealth vs. Alger, 7 Cush. 53: 'It is much easier to perceive and realize the existences and sources of this power than to mark its boundaries, or prescribe limits to its exercise.' And the definition there given has been, probably, more often quoted with approval than any other. 'The power vested in the Legislature by the Constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either wth or without penalties, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same." (Citing and quoting numerous State and Federal authorities and decisions of this Court).
>
> * * * * * * * * *
>
> P. 543. "The Supreme Court has, times almost without number, been called to pass upon laws enacted by the States upon matters relating to their internal government, and has given expression to the meaning to be ascribed to the police power. In the Slaughter House Cases, 16 Wall. 62, which were the first cases involving a construction of the Fourteenth Amendment, the Court said: 'This power is and must be from its very nature incapable of any very exact definition or limitation. Upon it depends the security of

social order, the life and health of citizens, the comfort of an existence in a thickly populated community, the enjoyment of private and social life and the beneficial use of property.' 'It extends' says another eminent judge, 'to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State,' 'and persons and property were subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the State. Of the perfect right of the Legislature to do this no question ever was, or upon acknowledged principles, even can be made so far as natural persons are concerned.' " (Citing and quoting numerous State and Federal authorities and decisions of this Court).

* * * * * * * * *

P. 546. "If then this power is inherent in every State for the preservation of its general welfare, is the ordinance in question an unreasonable exercise of it and are its provisions so arbitrary and oppressive that they amount to the invasion of a person's constitutional rights?

"As we have seen the avowed object of the ordinance is to preserve peace, prevent conflict and ill feeling between the two races and thereby promote the welfare of Baltimore. The means employed are that blocks which were occupied by colored people exclusively should continue to be occupied by them exclusively, and that blocks occupied exclusively by white people should so continue to be occupied by them."

* * * * * * * * *

"No intelligent observer in communities where there are many colored people can fail to notice that there are sometimes exhibitions of feelings between members of the two races, which are likely to, and occasionally do, result in outbreak of violence and disorder. It is not for us to say what this is attributable to, but the fact remains—however much it is to be regretted—and if a segregation of the races to such extent as may be permissible under the Constitution and laws of the land will have a tendency not only to avoid disorder and violence, but to make a better feeling between the races, everyone having the interests of the colored people as well as of the white people at heart ought to

encourage rather than oppose it. Mr. Justice Brown said in Plessy v. Ferguson, 163 U. S. 537: 'The object of the amendment (14) was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a comingling of the two races upon terms unsatisfactory to either.'

"If the welfare of the city, in the minds of the Council, demanded that the two races should be thus, to this extent, separated and thereby a cause of conflict removed, the Court cannot declare their action unreasonable. It was acknowledged by the counsel for the appellee, both in the brief and in verbal argument, that for years there had been more or less friction resulting from the occupancy by colored people of houses in blocks theretofore occupied wholly by white people. With this acknowledgment how can it be contended that the City Council, charged with looking to the welfare of the city, is seeking to make an unreasonable use of the police power, when it enacts a law which, in their opinion, will tend to prevent the conflict?"

The case of Pleasants vs. Wilson, 125 Md. 237, involved the power of trustees to impose restrictions on trust property.

The Court says at page 239, that: "The single question presented for our decision is, whether the trustees, the appellees here, have the power and authority under the will of the testator, to impose the restrictions, agreed upon in the contract of sale, on the remaining unsold property held by the trustees and this will depend upon the construction of the power conferred by the will itself, and the intent of the donor of the power, as to the mode in which the power must be executed."

The Court decided the question in the affirmative, namely, that the trustees had the power to impose the restriction; but did not quote in the opinion the provisions of the restrictions which it held to be valid; one of which, as

appears in the printed record of the Court of Appeals of Maryland in this case provides that:

> "At no time shall the land included in said tract or any part thereof, or any building erected thereon, be occupied by any negro or person of negro extraction."
>
> See also: Burns et al., v. Williams et al., *supra.*
>
> Neighborhood Corporation vs. Blum, *supra.*

The foregoing decisions of the Maryland Courts if not controlling are highly persuasive for the reasons hereinbefore stated.

In Hopkins vs. Richmond, 117 Va. 693, involving the validity of an ordinance segregating the white and colored races, the questions of reasonableness and constitutionality were involved.

Upon the question of reasonableness or public policy the court said at page 709:

> "The central idea of the ordinance under consideration seems very manifest. It is to prevent too close association of the races, which association results, or tends to result, in breaches of peace, immorality and damage to the health * * * The attainment of the objects in view is one much to be desired * * *."

The Court also at page 716 quoted with approval the following from Weschester & P. Co. vs. Miles, 55 Pa. 209:

> "The right of each to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right."

The court then continued:

> "When, therefore, we declare a right to maintain separate relations as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice or caste, but simply to suffer men to follow the law of

> races established by the Creator himself, and not to compel them to intermix contrary to their instincts."

See also the cases hereinbefore cited under the question of Constitutionality which also deal with the question of Public Policy.

Segregation Accords With Public Policy.

The segregation of the races, whether by statute or private agreement not involving the denial of fundamental constitutional rights, is clearly not only not against public policy but is in strict accord with the long established public policy of most of the States of this country and of the District of Columbia.

Intermarriage Prohibited.

As bearing upon the distinction between the general and particular rights of negroes as well as other citizens, the course of legislation and judicial decision upon another clear right should be considered. Every citizen has a right to marry. This is a general right, for no one has a right to marry another without the latter's consent. But the exercise of this right has been forbidden from earliest times in this country, and is still so forbidden, between certain individuals, on account of race and color.

In 27 Cyc. 798, it is said:

> "The term miscegenation is variously employed to indicate the intermarriage or cohabitation or sexual intercourse between persons of the opposite sex who belong to different races or both marriage and cohabitation between them."

See particularly State vs. Tutty, 41 Fed. 753; 7 L. R. A. 50, an exhaustive opinion delivered by U. S. District Judge Speer, Georgia.

27 Cyc. 800:

"The statutes of the States which have legislated upon the subject prohibit miscegenation between the Caucasian or white race, on the one hand; and, on the other, either the first alone, or that and one or both of the other two, of the following three races: the African, or black race; the Indian race; and the Mongolian race."

27 Cyc., 899, Note 2:

"It exists almost exclusively in those States of the Union in which non-Caucasian races form a considerable element of the population, as, in the Southern States, the African or black race, in the Western States, the Mongolian or yellow race, in the States of the midle or southwest, the Indian. It is the public policy of these States to maintain separate marital relations between these races and the white race, based upon the belief that the offspring of cohabitation between them are inferior in physical development and strength to the full blood of either race. Scott v. State, 39 Ga. 321."

In the case of Plessy vs. Ferguson, 163 U. S. 537, 41 L. Ed. 256, Mr. Justice Brown, delivering the opinion of this Court, refers to the miscegenation laws as follows at page 545:

"Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the Police Power of the State." Citing State vs. Gibson, 36 Ind. 389.

Justice Brown continues:

"The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theaters, and railway carriages, has been frequently drawn by this Court."

In Scott vs. Sanford, 19 How. 393 (15 L. Ed. 691) Chief Justice Taney refers at p. 408-409 and again at p. 413 to

the successive laws passed by the Provinces and also by the States prohibiting miscegenation either between white and negroes or whites and Indians or whites and mulattoes. The Province of Maryland passed such an act in 1717; Massachusetts in 1705; Massachusetts again in 1786 and again in 1836; Connecticut in 1788, etc.

The attitude of most of the States concerning miscegenation, as expressed in legislation and the decisions of the State and inferior Federal courts and of this court (see Plessy v. Ferguson, *supra*, and other cases cited), is proof of this.

Thirty of the States have laws preventing marriage between whites on the one hand and negroes or mulattoes, and in some cases Indians and Mongolians on the other hand.*

The wisdom of the miscegenation laws, whose purpose is to prevent the production of a mongrel race, the members of which are inferior to either of the original races from which they spring, is demonstrated as well by ancient history as by modern example.

The destruction of most ancient civilizations was due to mongrelization. The destruction of many modern states is rapidly proceeding, due to the same cause.

See:

"Race or Mongrel," A. P. Schultz.
"The Passing of the Great Race," Madison Grant.
"America: A Family Matter," Charles W. Gould.

And nothing so directly operates to bring about a violation of this law—not only a law of the State but a Law of Nature—as the breaking down of racial distinctions and the commingling of divers races, which, as this Court has said

*The States having laws prohibiting miscegenation are as follows: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Indiana, Idaho, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia and Wyoming.

in Plessy v. Ferguson, *supra*, was not intended to be brought about by the Fourteenth Amendment, the object of which was to enforce the legal and political equality of the two races, as well as of all other citizens.

The doctrine of the "Melting Pot," as applied to the amalgamation of the White, Red, Yellow and Black races in America, is the most dangerous of all the doctrines advanced by the modern altruistic sentimentalists. Carried to its logical conclusion it means the mongrelization of America and the destruction of American civilization.

Mixed Schools Prohibited.

In Plessy v. Ferguson, *supra*, this Court not only refers to the miscegenation laws, but also to the enforced separation of white and colored children in the public schools, which, this Court says: "Has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been long and most earnestly enforced."

This Court then refers to the school laws of Massachusetts and to the legislation by Congress for the District of Columbia and to the fact that the legislatures of many of the States have passed similar laws which "have been generally, if not uniformly, sustained by the courts."

As to the wide extent of laws or regulations requiring separate white and colored schools in all sections of the United States and in Canada, see 35 Cyc. 819 and 1111; and 43 Cent. Dig. Tit. "Schools and School Districts", sec. 15.

Sixteen of the States and also the District of Columbia have laws requiring separate schools to be maintained for white and colored children; in addition to which California has a law authorizing the establishment of separate schools for Indians, Mongolians, Japanese or Chinese children.*

*The States requiring separate schools for the races are as follows: Alabama, Arkansas, Delaware, District of Columbia, Florida, Georgia, Kentucky, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia and West Virginia.

The case of Roberts vs. Boston, 5 Cush. (Mass.) 198, upheld the rights of the school committee to maintain separate schools for white and colored children in Boston, notwithstanding there was no express legislative authority for the same.

In this case there were in Boston about 160 primary schools maintained for children between five and seven years of age, two were appropriated to the use of colored children and the others to white children. Plaintiff, a colored child, had been excluded from the primary school nearest her home which was for white children only, the nearest school for colored children being about one-fifth of a mile further. The Court held that it was the rightful authority of the school committee to separate the colored children from the white in the City of Boston. In the course of the opinion, the following appears: (p. 206)

"The great principle, advanced by the learned and eloquent advocate of the plaintiff, is, that by the constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. This, as a broad general principle, such as ought to appear in a declaration of rights, is perfectly sound; it is not only expressed in terms, but pervades and animates the whole spirit of our constitution of free government. But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and proection of the law, for their maintenance and security. What those rights are, to which individuals, in the infinite variety of circumstances by which they are surrounded in society, are entitled, must depend on laws adapted to their respective relations and conditions."

In the case of State ex rel. Clark, vs. Maryland Institute, 87 Md. 643, it was held that a private educational institution could lawfully exclude colored pupils, and that in so excluding them, it violated no rights secured by the fourteenth amendment to the constitution. In this case the City of Baltimore contributed money to the Institution. A councilman appointed a negro to the school, it refused to admit him and he brought mandamus to compel his admission.

In the case of Booker et al., vs. Grand Rapids Medical College, 156 Mich. 95, it was also held that a negro is denied no constitutional right by being excluded from a private corporate institution of learning.

In People vs. Gallagher, 93 N. Y. 438, the Court, Ruger, C. J., said concerning the right of a State to maintain separate schools for white and colored children, page 450:

"A natural distinction exists between these races which was not created neither can it be abrogated by law, and legislation which recognizes this distinction and provides for the peculiar wants or conditions of the particular race can in no just sense be called a discrimination against such race or an abridgement of its civil rights."

(See further extracts from this case in the opinions of both the Courts below.)

As above noted the Congress itself has expressed the public policy in the District of Columbia concerning segregation of the races in the public schools in legislation, the constitutionality and validity of which have been sustained in the case of Wall v. Oyster, 36 App. D. C. 50.

Other Segregation

The validity of laws requiring separate but equal accommodations for the races in public conveyances is so well settled as to need no more than mention.

It is perfectly clear, and the legislation now in effect throughout the United States and the judicial decisions sustaining such legislation emphasize the fact, that the co-

mingling of the races, rather than their segregation, tends to stimulate antipathy between them, and that the trend of legislation is towards segregation.

In this connection attention is called to the case of Terrace v. Thompson, 263 U. S. 197.

As has been pointed out above, both of the lower Courts have taken judicial notice, and this Court will also take judicial notice, not only of the legislation of the Congress for the District of Columbia, but also of the uniform legislative-executive actions of the municipal authorities of the District of Columbia in segregating the races in: (a) Municipal Playgrounds, (b) Municipal Golf Courses, (c) Municipal Tennis Courts and (d) Municipal Bathing Beaches; as well as of "the community common sense" and the "general and well-settled public opinion" (Kintz v. Harriger, *supra*) which has existed from time immemorial in the District of Columbia in respect of the segregation of the races in churches, hotels, restaurants, lodging houses and apartment houses, and in theaters and other places of public amusement.

Can it be questioned that the owner of an apartment house is at liberty to refuse to rent one of his apartments to a negro? Can there be any question that a number of owners of an apartment house on the co-operative plan can enter into a valid and enforceable agreement binding themselves, their heirs and assigns, not to permit any one of the apartments to be occupied by a negro? Can it be questioned that a group of white home owners in a restricted neighborhood can do likewise?

The Communistic Argument

The immaterial and extrinsic arguments scattered throughout the appellants' brief assume that the white people of the United States own and control or could obtain ownership and control of all property, not only in the City of Washington, but throughout the District of Columbia,

and elsewhere, and are adaptations of the communistic doctrine so eloquently, even if unconvincingly, expressed by Bernard Shaw, who argues that because the habitable area of the earth is limited a time will come when there is no land for certain men and therefore the institution of private property and the right of an individual to own land must be abolished.

After describing how the first Adam preempted the best land and succeeding Adams, Cains and Abels get land less and less fertile, until all the land is occupied, he says:

> "But at this point there appears in the land a man in a strange plight—one who wanders from snow line to sea coast in search of land, and finds none that is not the property of some one else. Private property had forgotten this man. On the roads he is a vagrant: off them he is a trespasser: he is the first disinherited son of Adam, the first Proletarian, one in whose seed all the generations of the earth shall yet be blest, but who is himself for the present foodless, homeless, shiftless, superfluous, and everything that turns a man into a tramp or a thrall."

He later proceeds:

> "In due replenishment of the earth there comes another Proletarian who is no cleverer than other men, and can do as much, but not more than they. For him there is no rent of ability."

And finally he says that all this: "is practically a demonstration that public property in land is the basic economic condition of Socialism," and private property must be abolished.

Fabian Essays in Socialism, 1889, pp. 3-29.

COVENANT NOT VOID AS RESTRAINING ALIENATION.

In 18 Corps Juris, 361, Sec. 378, it is stated:

> "If an estate is granted in fee, conditions or restrictions absolutely restraining alienation, when repugnant to the estate created, are void as against public policy. There may, however, be a restriction upon such power to a limited extent." (Citing numerous cases, including Queensboro Land Co. v. Cazeaux, 136 La. 724-730; cited above.)

See also cases cited under note 79 at page 361.

The case of Cowell v. Colorado Springs Co., 100 U. S. 55, referred to by appellants on pages 56 and 58 of their brief, sustains the doctrine contended for by appellee; and would seem to settle this question.

In this case the Colorado Springs Co. sold to Cowell two lots, the deed containing a clause to the effect that intoxicating liquors should never be sold on the premises, and in the event of such sale the deed should become null and void and the title should revert to the grantor. Liquor was sold and the grantor brought an action in ejectment. In answer to the contention that the condition was repugnant to the estate granted Mr. Justice Field, delivering the opinion of this Court, says at page 57:

> " * * * But the answer is, that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate." * * * "Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate; they do not destroy or limit its alienable or inheritable character."

The case of Potter v. Couch, 141 U. S. 296, cited by appellants on page 32 of their brief (and misquoted) is, in fact, when properly read, authority for the appellee.

At page 315 Mr. Justice Gray, speaking for the Court, first states the doctrine that a condition against *all* alienation is void, because repugnant to the estate devised. He then points out that a restriction, whether by way of condi-

tion or of devise over, "not forbidding alienation to particular persons or for particular purposes only, but against any and all alienation whatever during a limited time" is likewise void as repugnant to the estate devised.

Here the clear distinction is made as between a condition against *all* alienation and a condition against alienation *to particular persons* or *for particular purposes only.*

On page 32 of their brief, appellants quote from the opinion of Mr. Justice Gray in Potter vs. Couch, *supra,* as follows (citing page 313, the correct citation being page 315):

> "But the right of alienation is an inherent and inseparable quality of an estate in fee simple. In a devise of land in fee simple, therefore, a condition against all alienation is void, because repugnant to the estate devised. Lit., Sec. 360; Co. Lit., 206b 223a; 4 Kent Com., 131; *McDonogh* v. *Murdock,* 15 How., 367, 373, 412. For the same reason, a limitation over, in case the first devise shall alien, is equally void, whether the estate be legal or equitable. *Howard* v. *Carusi,* 109 U. S,. 725; *Ware* v. *Cann,* 10 B. & C., 433; *Shaw* v. *Ford,* 7 Ch. D., 669; *in re Dugdale,* 38 Ch. D., 176; *Corbett* v. *Corbett,* 13 P. D., 136; *Steib* v. *Whitehead,* 111 Illinois, 247, 251; *Kelley* v. *Meims,* 135 Mass., 231, and cases there cited. And on principle, and according to the weight of authority (notwithstanding opposing dicta in *Cowell* v. *Springs Co.,* 100 U. S., 55, 57, and in other books), a restriction, whether by way of condition or of devise over, on any and all alienation, although for a limited time, of an estate in fee, is likewise void, as repugnant to the estate devised to the first taker, by depriving him during that time of the inherent power of alienation. *Roosevelt* v. *Thurman,* 1 Johns., Ch. 220; *Mandlebaum* v. *McDonell,* 29 Mich., 77; *Anderson* v. *Cary,* 36 Ohio St., 506; *Twitty* v. *Camp,* Phil. Eq. (No. Car.) 61; *In re Rosher,* 26 Ch. D., 801."

It will be observed that appellants have inserted in their quotation a phrase which is not in the opinion, namely:

> **"(Notwithstanding opposing dicta in Cowell v. Colorado Springs Co., 100 U. S., 55, 57, and in other books)."**

Whether this was done by inadvertance or in an endeavor to make it appear that this Court had disaffirmed the doctrine laid down in Cowell v. Colorado Springs Co., *supra,* and had characterized the language of Mr. Justice Field in the Colorado Springs case as dictum, the appellee is unable to determine.

The important fact is that the opinion in the Colorado Springs Co. case stands and is controlling in this case. It is to be observed that Mr. Justice Field sat and concurred in the opinion in the case of Potter v. Couch, *supra.*

See also: Camp v. Cleary, 76 Va. 140; the 4th headnote of which is as follows:

> "Power of alienation may be restricted to a limited extent, as to designated persons; but absolute restraint is inadmissible," etc.

See pages 143 and 147, as to the rule against perpetuities.

Koehler v. Rowland, 275 Mo. 573: Lot sold subject to provision that it shall not be sold, leased or rented to any negro for 25 years and on breach property shall revert. Defendant leased to negroes. Lower court adjudged plaintiffs were owners in fee simple as defendant had forfeited his rights. Defendant among other contentions, asserted that the restriction is an unlawful restraint upon alienation.

> "All the cases cited by respondent in support of the position are when there is a stipulation directly prohibiting alienation. It is the rule that an absolute restriction in the power of alienation in conveyance of a fee simple title is void, but it is entirely within the right and power of the grantor to impose a condition or restraint upon the power of alienation in certain cases to certain persons, or for a certain time, or for certain purposes. Cowell v. Colorado Springs Co., 100 U. S. 55; Devlin Real Estate S. 965.
>
> "The condition in the deed under consideration does not come within the rule prohibiting restraints upon alienation."

The Court discussed the question of public policy, citing Slaughter House and Plessy vs. Ferguson cases, and held it

not contrary to public policy to discriminate against negroes in certain matter, for example segregation.

See also Keltner vs. Harris, *supra.*

Firth v. Marovich, 160 Cal. 257;
DeGray v. Monmouth Beach Clubhouse Co., 50 N. J., Eq. 329;
Parmalee et al v. Morris, *supra.*

See also the other cases cited above under the heads of Constitutionality and Public Policy.

The validity of a covenant in partial restraint of alienation or containing restrictions as to use and occupancy is definitely established, especially for the District of Columbia, by this Court in Cowell v. Colorado Springs Co., *supra,* and Potter v. Couch, *supra;* and by the District of Columbia and Maryland cases cited herein.

INJUNCTION PROPER REMEDY.

That injunction to prevent violations of covenants and thereby to compel specific performance of the same is the proper remedy is clear from the following cases:

Chevy Chase Land Co., vs. Pool, 48 App. D. C. 400;
Spilling vs. Hutcheson, 111 Va. 179;
Citing: Doherty vs. Allman, 3 H. L. App. Cas. 729;
4 Pomeroy Eq. Jur., (3 Ed.) Sec. 1342;
DeGray vs. Monmouth Beach Clubhouse Co., *supra;*
32 Corpus Juris, 203-207, Secs. 315-323, citing under Sec. 316;
Chevy Chase Land Co. vs. Poole, *supra.*

In the case of Spilling v. Hutcheson, 111 Va. 179, a bill in equity was filed charging a breach of a covenant containing building restrictions and praying for a mandatory injunction compelling the defendant to conform his building to the established line. Defendant denied the breach and contended that if there were a breach the plaintiff would have a full, adequate and complete remedy by action at law for damages.

Whittle, J., p. 182, in commenting upon the contention that appellant should be left to remedy at law for the breach of covenant stated:

"We do not concur in this contention * * * The correct rule in such case is clearly stated by Lord Cairns in Doherty v. Allman, 3 H. L. App. Cas. 729, as follows: 'If parties, for a valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say by way of injunction that which the parties have already said by way of covenant, that the thing shall not be done, and in such case the injunction does nothing more than give the sanction of the process of the court to that which already is the contract between the parties. It is not, then, a question of convenience or inconvenience, or of the amount of damage or injury—it is the specific performance, by the court, of that negative bargain which the parties have made, with their eyes open, between themselves.'

"In 4 Pomeroy's Eq. Jur. (3rd Ed.) sec. 1342, the author, in discussing the subject of 'Restrictive Covenants Creating Equitable Easements,' observes: '* * * The injunction in this case is granted almost as a matter of course upon a breach of the covenant. The amount of damages, and even the fact that the plaintiff has sustained any pecuniary damages, are wholly immaterial. * * * It is clearly established by authority that ~~their~~ there is sufficient to justify the court in interfering, if there has been a breach of the covenant, it is not for the court but for the plaintiffs to estimate the amount of damages that arises from the injury inflicted upon them. The moment that the court finds that there has been a breach of the covenant, that is an injury, and the court has no right to measure it and no right to refuse to the plaintiff the specific performance of the contract, although his remedy is that which I have described, namely, an injunction.' "

CONCLUSION.

In conclusion it is respectfully submitted that the decree of the Court below should be affirmed.

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Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 104.—October Term, 1925.

Irene Hazel Corrigan and Helen Curtis, otherwise known as Mrs. A. L. Curtis, Appellants, vs. John J. Buckley. | Appeal from the Court of Appeals of the District of Columbia.

[May 24, 1926.]

Mr. Justice Sanford delivered the opinion of the Court.

This is a suit in equity brought by John J. Buckley in the Supreme Court of the District of Columbia against Irene H. Corrigan and Helen Curtis, to enjoin the conveyance of certain real estate from one to the other of the defendants.

The case made by the bill is this: The parties are citizens of the United States, residing in the District. The plaintiff and the defendant Corrigan are white persons, and the defendant Curtis is a person of the negro race. In 1921, thirty white persons, including the plaintiff and the defendant Corrigan, owning twenty-five parcels of land, improved by dwelling houses, situated on S Street, between 18th and New Hampshire Avenue, in the City of Washington, executed an indenture, duly recorded, in which they recited that for their mutual benefit and the best interests of the neighborhood comprising these properties, they mutually covenanted and agreed that no part of these properties should ever be used or occupied by, or sold, leased or given to, any person of the negro race or blood; and that this covenant should run with the land and bind their respective heirs and assigns for twenty-one years from and after its date.

In 1922, the defendant entered into a contract by which the defendant Corrigan, although knowing the defendant Curtis to be a person of the negro race, agreed to sell her a certain lot, with dwelling house, included within the terms of the indenture, and the defendant Curtis, although knowing of the existence and

terms of the indenture, agreed to purchase it. The defendant Curtis demanded that this contract of sale be carried out, and, despite the protest of other parties to the indenture, the defendant Corrigan had stated that she would convey the lot to the defendant Curtis.

The bill alleged that this would cause irreparable injury to the plaintiff and the other parties to the indenture, and that the plaintiff, having no adequate remedy at law, was entitled to have the covenant of the defendant Corrigan specifically enforced in equity by an injunction preventing the defendants from carrying the contract of sale into effect; and prayed, in substance, that the defendant Corrigan be enjoined during twenty-one years from the date of the indenture, from conveying the lot to the defendant Curtis, and that the defendant Curtis be enjoined from taking title to the lot during such period, and from using or occupying it.

The defendant Corrigan moved to dismiss the bill on the grounds that the "indenture or covenant made the basis of said bill" is (1) "void in that the same is contrary to and in violation of the Constitution of the United States," and (2) "is void in that the same is contrary to public policy." And the defendant Curtis moved to dismiss the bill on the ground that it appears therein that the indenture or covenant "is void, in that it attempts to deprive the defendant, the said Helen Curtis, and others of property, without due process of law; abridges the privilege and immunities of citizens of the United States, including the defendant, Helen Curtis, and other persons within this jurisdiction [and denies them] the equal protection of the law, and therefore, is forbidden by the Constitution of the United States, and especially by the Fifth, Thirteenth, and Fourteenth Amendments thereof, and the Laws enacted in aid and under the sanction of the said Thirteenth and Fourteenth Amendments."

Both of these motions to dismiss were overruled, with leave to answer. 52 Wash. L. Rep. 402. And the defendants having elected to stand on their motions, a final decree was entered enjoining them as prayed in the bill. This was affirmed, on appeal, by the Court of Appeals of the District. 299 Fed. 899. The defendants then prayed an appeal to this Court on the ground that such review was authorized under the provisions of § 250 of the Judicial Code—as it then stood, before the amendment made by the Jurisdictional Act of 1925—in that the case was one "involving the construction

or application of the Constitution of the United States" (par. 3), and "in which the construction of" certain laws of the United States, namely sections 1977, 1978, 1979 of the Revised Statutes, were "drawn in question" by them (par. 6). This appeal was allowed, in June, 1924.

The mere assertion that the case is one involving the construction or application of the Constitution, and in which the construction of Federal laws is drawn in question, does not, however, authorize this Court to entertain the appeal; and it is our duty to decline jurisdiction if the record does not present such a constitutional or statutory question substantial in character and properly raised below. *Sugarman* v. *United States*, 249 U. S. 182, 184; *Zucht* v. *King*, 260 U. S. 174, 176. And under well settled rules, jurisdiction is wanting if such questions are so unsubstantial as to be plainly without color of merit and frivolous. *Wilson* v. *North Carolina*, 169 U. S. 586, 595; *Delmar Jockey Club* v. *Missouri*, 210 U. S. 324, 335; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 305; *Moore* v. *New York Cotton Exchange*, No. 200, decided April 12, 1926.

Under the pleadings in the present case the only constitutional question involved was that arising under the assertions in the motions to dismiss that the indenture or covenant which is the basis of the bill, is "void" in that it is contrary to and forbidden by the Fifth, Thirteenth and Fourteenth Amendments. This contention is entirely lacking in substance or color of merit. The Fifth Amendment "is a limitation only upon the powers of the General Government," *Talton* v. *Mayes*, 163 U. S. 376, 382, and is not directed against the action of individuals. The Thirteenth Amendment denouncing slavery and involuntary servitude, that is, a condition of enforced compulsory service of one to another, does not in other matters protect the individual rights of persons of the negro race. *Hodges* v. *United States*, 203 U. S. 1, 16, 18. And the prohibitions of the Fourteenth Amendment "have reference to State action exclusively, and not to any action of private individuals." *Virginia* v. *Rives*, 100 U. S. 313, 318; *United States* v. *Harris*, 106 U. S. 629, 639. "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment." *Civil Rights Cases*, 109 U. S. 3, 11. It is obvious that none of these Amend-

ments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void. And, plainly, the claim urged in this Court that they were to be looked to, in connection with the provisions of the Revised Statutes and the decisions of the courts, in determining the contention, earnestly pressed, that the indenture is void as being "against public policy", does not involve a constitutional question within the meaning of the Code provision.

The claim that the defendants drew in question the "construction" of sections 1977, 1978 and 1979 of the Revised Statutes, is equally unsubstantial. The only question raised as to these statutes under the pleadings was the assertion in the motion interposed by the defendant Curtis, that the indenture is void in that it is forbidden by the laws enacted in aid and under the sanction of the Thirteenth and Fourteenth Amendments. Assuming that this contention drew in question the "construction" of these statutes, as distinguished from their "application," it is obvious, upon their face, that while they provide, *inter alia*, that all persons and citizens shall have equal right with white citizens to make contracts and acquire property, they, like the Constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property. There is no color for the contention that they rendered the indenture void; nor was it claimed in this Court that they had, in and of themselves, any such effect.

We therefore conclude that neither the constitutional nor statutory questions relied on as grounds for the appeal to this Court have any substantial quality or color of merit, or afford any jurisdictional basis for the appeal.

And while it was further urged in this Court that the decrees of the courts below in themselves deprived the defendants of their liberty and property without due process of law, in violation of the Fifth and Fourteenth Amendments, this contention likewise cannot serve as a jurisdictional basis for the appeal. Assuming that such a contention, if of a substantial character, might have constituted ground for an appeal under paragraph 3 of the Code provision, it was not raised by the petition for the appeal or by any assignment of error, either in the Court of Appeals or in this Court;

and it likewise is lacking in substance. The defendants were given a full hearing in both courts; they were not denied any constitutional or statutory right; and there is no semblance of ground for any contention that the decrees were so plainly arbitrary and contrary to law as to be acts of mere spoliation. See *Delmar Jockey Club* v. *Missouri, supra*, 335. Mere error of a court, if any there be, in a judgment entered after a full hearing, does not constitute a denial of due process of law. *Central Land Co.* v. *Laidley*, 159 U. S. 103, 112; *Jones* v. *Buffalo Creek Coal Co.*, 245 U. S. 328, 329.

It results that, in the absence of any substantial constitutional or statutory question giving us jurisdiction of this appeal under the provisions of § 250 of the Judicial Code, we cannot determine upon the merits the contentions earnestly pressed by the defendants in this court that the indenture is not only void because contrary to public policy, but is also of such a discriminatory character that a court of equity will not lend its aid by enforcing the specific performance of the covenant. These are questions involving a consideration of rules not expressed in any constitutional or statutory provision, but claimed to be a part of the common or general law in force in the District of Columbia; and, plainly, they may not be reviewed under this appeal unless jurisdiction of the case is otherwise acquired.

Hence, without a consideration of these questions, the appeal must be, and is

Dismissed for want of jurisdiction.

A true copy.

Test:

Clerk, Supreme Court, U. S.